No. 92-590

Supreme Court, U.S.
FILED
AUG 11 1992
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

MEYERLAND COMPANY AND
WILLLIAM MICHAEL ADKINSON,
PETITIONERS,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
AS MANAGER OF THE FSLIC RESOLUTION FUND,
AS RECEIVER FOR CONTINENTAL SAVINGS
ASSOCIATION,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MIKE O'BRIEN
MIKE O'BRIEN, P.C.
440 LOUISIANA
SUITE 2300
HOUSTON, TEXAS 77002
TEL: (713) 222-0088
FAX: (713) 222-6903

COUNSEL FOR PETITIONERS

QUESTIONS PRESENTED

I. Whether the general removal statutes or the removal provisions of the Financial Institutions Reformation Recovery and Enforcement Act empower a federal district court to interfere with a final judgment, which is being reviewed in the state appellate process, when no other independent basis for removal exists under federal law.

II. Whether the removal of a case pending in a state appellate court, where no original jurisdiction can be exercised by the federal district court, violates the United States Constitution.

III. If removal of a case pending in any phase of a state appellate process is permitted by the FDIC's statutes and the United States Constitution, what is the appropriate procedural track for the case in federal court?

PARTIES

The plaintiffs below were Meyerland Company and William Michael Adkinson. The defendant was the Federal Deposit Insurance Corporation, as manager of the FSLIC Resolution Fund, as Receiver of Continental Savings Association.

Petitioner Meyerland Company is a wholly owned subsidiary of The Development Group, Inc. Meyerland Company has no subsidiaries.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES vii

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED . . . 2

RULES AND STATUTES INVOLVED 4

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE 5

STATEMENT OF THE CASE 5

REASONS FOR GRANTING CERTIORARI 7

I. THE FIFTH CIRCUIT ERRONEOUSLY HELD THAT THE FDIC'S REMOVAL STATUTES EXPAND A FEDERAL DISTRICT COURT'S POWER TO INCLUDE REMOVAL JURISDICTION OVER A CASE PENDING IN ANY PHASE OF A STATE APPELLATE PROCESS. 7

A. Congress Intended FIRREA to Rely Upon General Removal Statutes Which Provide No Basis for Federal Court Jurisdiction Over Cases Pending in a State Appellate Court. 8

1. The federal district court does not have original jurisdiction over the dispute, which is required by general removal statutes. 11
2. If Congress had intended to depart from the ordinary removal procedural requirements, it would have explicitly done so. 12
B. FIRREA Provides No Basis for Federal Court Jurisdiction Over Cases Pending in a State Appellate Court. 14
1. The language of 12 U.S.C. § 1819(b)(2) does not authorize the removal of an action after the state trial court loses plenary power over the action. 15
2. An action pending in a state appellate court is not "appealable" within the meaning of 12 U.S.C. § 1821(d)(13). . . . 18

II. IN THE ALTERNATIVE, THE FIFTH CIRCUIT ERRONEOUSLY HELD THAT THE UNITED STATES CONSTITUTION ALLOWED A FEDERAL DISTRICT COURT TO EXERCISE REMOVAL JURISDICTION OVER A CASE PENDING IN ANY PHASE OF A STATE APPELLATE PROCESS. 20
A. Concepts of Comity and Federalism Require that a Federal Court Refrain from Exercising Appellate Jurisdiction Over Final State Court Judgments. 22

B. The Tenth Amendment Obligates Congress and Federal Courts to Respect a Final State Court Judgment 23

C. The Seventh Amendment Precludes Federal Reexamination of a Final State Judgment. 24

CONCLUSION 25

TABLE OF APPENDICES 27

This Page Intentionally Left Blank

TABLE OF AUTHORITIES

U.S. SUPREME COURT CASES

Atlantic Coast Line Ry. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970) 11, 20, 21

Bender v. Williamsport Area School Dist., 475 U.S. 534 (1985) 21

Coyle v. Oklahoma, 221 U.S. 559 (1911) 23

Dist. of Columbia Ct. of Appeals v. Feldman, 460 U.S. 462 (1983) 11

Evans v. U.S., -- U.S. --, 112 S. Ct. 1881, 1901 (1992) 9, 21, 23, 24

Granny Goose Foods, Inc. v. Brotherhood of Teamsters and Auto Truck Drivers Local No. 70 of Alameda County, 415 U.S. 423 (1974) 19

Gregory v. Ashcroft, 111 S. Ct. 2395 (1991) 9, 23

Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982) 11

Huffman v. Pursue, Ltd., 420 U.S. 592, 603 (1975), *reh'g denied*, 421 U.S. 971 (1975) 23

Immigration and Naturalization Serv. v. Chadha, 462 U.S. 942 (1983) 11, 21

Isbrandtsen v. Johnson, 343 U.S. 779 (1952) 9

Kremer v. Chemical Const. Corp., 456 U.S. 461 (1982), *reh'g denied*, 458 U.S. 1133 (1982) 22, 23

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 11, 21

Midlantic Nat'l Bank v. New Jersey Dept. of Env't Protection, 474 U.S. 494 (1986) 9, 13

Mills v. Duryee, 11 U.S. (7 Cranch) 481 (1813) 22

Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518 (1986), *on remand to*, 758 F.2d 929 (11th Cir. 1986), *on remand to*, NO. Civ. A. 83V-181-N (M.S. Ala., 1986), *j. aff'd*, 825 F.2d 1475 (11th Cir. 1987), *cert. denied*, 484 U.S. 1060 (1988) 22

Parsons v. Bedford, Breedlove & Robeson, 28 U.S. (3 Pet.) 433 (1830) 24

Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) 11

Thompson v. Immigration and Naturalization Service, 375 U.S. 384 (1964), *on remand to*, 323 F.2d 167 (7th Cir. 1964) 18

U. S. COURT OF APPEALS CASES

Azzopardi v. Ocean Drilling & Exploration Co., 742 F.2d 890 (5th Cir. 1984) 16

Beighley v. Federal Deposit Ins. Corp., 868 F.2d 776 (5th Cir. 1989) 16

Carrollton Farmers Branch Independent School Dist. v. Johnson & Cravens, 889 F.2d 571 (5th Cir. 1989), *on remand to*, 776 F. Supp. 1180 (N.D. Tex. 1991) 15

Corpus Christi Taxpayers Ass'n v. City of Corpus Christi, Texas, 858 F.2d 973 (5th Cir. 1988), *reh'g denied*, 860 F.2d 437, *cert. dism'd*, 490 U.S. 1032, *cert. denied*, 490 U.S. 1065 23

Federal Deposit Ins. Corp. v. Yancey Camp Development, 889 F.2d 647 (5th Cir. 1989) 17

Federal Deposit Ins. Corp. v. Loyd, 955 F.2d 316 (5th Cir. 1992) 12

Giannakos v. M/V Bravo Trader, 762 F.2d 1295 (5th Cir. 1985) 21

In re Franklin National Bank Securities Litigation, 532 F.2d 842 (2d Cir. 1976) 12

In re Meyerland Co., 910 F.2d 1257 (5th Cir. 1990) 2, 6

In re Meyerland Co., 960 F.2d 512 (5th Cir. 1992) 2, 7, 10, 14, 15, 17, 18

In re Savers Federal Sav. & Loan Ass'n, 872 F.2d 963 (11th Cir. 1989) 16

Jackson v. American Sav. Mortg. Corp., 924 F.2d 195 (11th Cir. 1991) 17

Lazuka v. Federal Deposit Ins. Corp., 931 F.2d 1530 (11th Cir. 1991) 13

Marcal Paper Mills, Inc. v. Ewing, 790 F.2d 195 (1st Cir. 1986) 23

Munsey v. Testworth Laboratories, 227 F.2d 902 (6th Cir. 1955) 16

Murray v. Ford Motor Co., 770 F.2d 461 (5th Cir. 1985) 16

Northshore Development, Inc. v. Lee, 835 F.2d 580 (5th Cir. 1988) 16

Union Federal Bank of Indianapolis v. Minyard, 919 F.2d 335 (5th Cir. 1990) 16

Ward v. Resolution Trust Corp.,
91-3015EA (8th Cir. July 30, 1992) 17

Woburn Five Cents Sav. Bank v. Robert M. Hicks, Inc., 930 F.2d 965 (1st. Cir. 1991) . 10, 12, 14

DISTRICT COURT AND STATE COURT CASES

Addison Airport of Texas, Inc. v. Eagle Investment Co., 691 F.Supp. 1022 (N.D. Tex. 1988) 17

Alpert v. Resolution Trust Corp., No. CIV. A. 91-B-1907 (D.Colo. June 19, 1992) 11

Federal Deposit Ins. Corp. v. Norwood, 726 F. Supp. 1073 (S.D. Tex. 1989) 12

Federal Deposit Ins. Corp. v. Ritchie, 646 F. Supp. 1581 (D. Neb. 1986) 16

Federal Deposit Ins. Corp. v. Sellards, 731 F. Supp. 1300 (N.D. Tex. 1990) 19

Federal Deposit Ins. Corp. v. Taylor, 727 F. Supp. 326 (S.D. Tex. 1989) 16

Federal Savings and Loan Ins. Corp. v. Templeton, 700 F. Supp. 456 (S.D. Ind., 1988) 23

Mitchell v. Carter, 545 S.W.2d 869 (Tex.Civ.App.--Waco 1977) 23

Transamerica Leasing Co. v. Three Bears Inc., 567 S.W.2d 799 (Tex. 1978) 11

Vernon Sav. and Loan Ass'n v. Commerce Sav. and Loan Ass'n, 677 F. Supp. 495 (N.D. Tex. 1988) 16

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

12 U.S.C. § 1819 (1984) 5, 8, 12-16

12 U.S.C. § 1821 (1984) 5, 14, 18, 19

28 U.S.C. § 1254 (1984) 2

28 U.S.C. § 1257 (1984) 5

28 U.S.C. § 1331 11

28 U.S.C. § 1345 (1984) 5

28 U.S.C. § 1441 (1984) 5, 10, 11, 14

28 U.S.C. § 1446 (1984) 13

28 U.S.C. § 1447 (1984) 12

FDIC Improvement Act, Pub. L. No. 102-242 §161, 105 Stat. 2285 (1991) 13

Fed. R. Civ. P. 6 4

Fed. R. Civ. P. 59 . . . . . 4, 20, 21

Fed. R. Civ. P. 60 . . . . . 4, 8, 17, 20, 21

Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183 (Aug. 9, 1989) 4, 6-8, 12-16, 18-20, 25

Tex. R. App. P. 46 18

Tex. R. Civ. P. 329b 7, 11

U.S. Const. amend. VII 4, 24

U.S. Const. amend. X 4, 23, 24

U.S. Const. amend. XIV, § 1 4

U.S. Const. amend. XIV, § 5 4

U.S. Const. art. III 2, 3, 21

U.S. Const. art. IV, § 1 . . . . . 3, 22

U.S. Const. art. IV, § 2 3

OTHER AUTHORITIES

H.R. Rep. No. 54(I), 101st Cong., 1st Sess., reprinted in 1989 U.S.Code Cong. & Admin. News 86, 124-25 16

House Report 101-54(I), p. 330,
U.S.Code Congressional and Administrative
News, 101st Cong. 1989, Vol. 2, p. 330. 19

Judicial Improvements and Access
to Justice Act. Pub. L. No.
100-702, 1988 13

NO._____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

MEYERLAND COMPANY AND
WILLLIAM MICHAEL ADKINSON,
PETITIONERS,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
AS MANAGER OF THE FSLIC RESOLUTION FUND,
AS RECEIVER FOR CONTINENTAL SAVINGS
ASSOCIATION,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment and en banc opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

District Judge Kenneth Hoyt's unpublished order of remand is included in the Appendix at p. 39a. The panel opinion of the Fifth Circuit Court of Appeals in the case of *In re Meyerland Co.*, 910 F.2d 1257 (5th Cir. 1990) is included in the Appendix at pp. 46a-64a. The en banc opinion of the Fifth Circuit Court of Appeals in the case of *In re Meyerland Co.*, 960 F.2d 512 (5th Cir. 1992) is included in the Appendix at pp. 1a-27a.

JURISDICTION

(i) The judgment sought to be reviewed (the en banc opinion of the Fifth Circuit Court of Appeals) was entered on May 13, 1992.

(ii) No motion for rehearing from the en banc opinion of the Fifth Circuit Court of Appeals was filed. Additionally, no request for an extension of time to file this petition for a writ of certiorari was requested.

(iii) This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1984). Additionally, the Fifth Circuit, in departing from the accepted and usual course of judicial proceedings, has decided an important question of law which has not been, but should be, decided by this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. (1) The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--to Controversies between Citizens of different States;--between Citizens of the same State claiming Lands under the Grants of different States, [and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.][1]

(2) In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

United States Constitution, Article IV

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State; And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

---

[1] Changed by the Eleventh Amendment

United States Constitution, Amendment 7, 1791

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

United States Constitution, Amendment 10, 1791

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

United States Constitution, Amendment 14, 1868

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

RULES AND STATUTES INVOLVED

1) Fed. R. Civ. P. 6, included in the Appendix at p. 80a;
2) Fed. R. Civ. P. 59, included in the Appendix at p. 81a;
3) Fed. R. Civ. P. 60, included in the Appendix at p. 82a;
4) Financial Institutions Reform, Recovery and

Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183 (Aug. 9, 1989), included in the Appendix at p. 93a;

5) 28 U.S.C. § 1257 (1984), included in the Appendix at p. 92a;

6) 28 U.S.C. § 1345 (1984), included in the Appendix at p. 84a;

7) 28 U.S.C. § 1441 (1984), included in the Appendix at p. 85a;

8) 12 U.S.C. § 1819 (1984), included in the Appendix at p. 93a.

9) 12 U.S.C. § 1821 (1984), included in the Appendix at p. 97a.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The nature of this appeal contests the basis for jurisdiction in the United States district court. Removal was purportedly authorized pursuant to 12 U.S.C. § 1819(b)(2) and 12 U.S.C. § 1821(d)(13).

STATEMENT OF THE CASE

This is an appeal from United States District Judge Kenneth Hoyt's order remanding this case back to an intermediate appellate court, the Court of Appeals for the First Supreme Judicial District of Texas. (Order of Remand, App. at 40a.)

More than two years earlier, on May 26, 1987, a state trial court entered a judgment for Continental Savings and against Meyerland Company and its president, William M. Adkinson. (R. 9 at 7-9.) Meyerland and Adkinson appealed the final state judgment to the state appellate court. (R. 4 at 2.) Briefs were filed and arguments were scheduled on the claims involving purely state law matters. *Id.*

While the case was pending in the state appellate court and sixteen months after the state trial court had entered its judgment, the Federal Home Loan Bank Board declared Continental Savings insolvent and appointed the Federal Savings and Loan Insurance Corporation (FSLIC) as receiver for the failed savings institution. (Appellant's Br., En Banc Hr'g at 4.) FSLIC sought to have its derivative rights in the state court action adjudged by a federal district court when it filed a notice of removal. (R. 1 at 1.) On April 21, 1989, Judge Hoyt ordered the case remanded back to the state appellate court. (R. 11 at 1.)

Four months later, Congress enacted FIRREA, which dissolved FSLIC and substituted the Federal Deposit Insurance Corporation (FDIC) as receiver of the failed savings institution. (Appellant's Br., En Banc Hr'g at 6.) Once again, the receiver attempted to have its derivative rights in the state court action adjudged by a federal district court when it filed another notice of removal. *Id.* On September 29, 1989, Judge Hoyt remanded the case back to the state appellate court a second time because removal in this case violated the purpose and spirit of the removal statutes. *Id.* Additionally, Judge Hoyt imposed sanctions against the receiver and its attorney. *Id.*

Judge Hoyt's Order of Remand and Sanctions was appealed to the United States Court of Appeals for the Fifth Circuit. Respondent claimed that removal to federal court was properly predicated upon the recent enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183 (Aug. 9, 1989). *Id.* On September 7, 1990, a divided panel of the Fifth Circuit reversed Judge Hoyt's order in a published opinion. *In re Meyerland Co.*, 910 F.2d 1257 (5th Cir. 1990). This panel opinion was subsequently vacated by the Fifth Circuit's decision to rehear the case en banc. (Appellant's Br., En Banc Hr'g at 7.) On May 13, 1992, a

seven to five majority of the court[2] reversed Judge Hoyt's order. *In re Meyerland Co.*, 960 F.2d 512 (5th Cir. 1992).

REASONS FOR GRANTING CERTIORARI

I. THE FIFTH CIRCUIT ERRONEOUSLY HELD THAT THE FDIC'S REMOVAL STATUTES EXPAND A FEDERAL DISTRICT COURT'S POWER TO INCLUDE REMOVAL JURISDICTION OVER A CASE PENDING IN ANY PHASE OF A STATE APPELLATE PROCESS.

According to the Fifth Circuit Court of Appeals, the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183 (Aug. 9, 1989) gives the FDIC absolute discretion to ignore state rules of finality and any jurisdictional or waiver problems facing its predecessor in interest in a state court suit once the FDIC intervenes. The Fifth Circuit's decision endorses the FDIC's belief that it has unfettered discretion to relitigate a state court verdict in a United States district court of its choosing almost two years after the verdict becomes final.[3] This interpretation ignores the provision of FIRREA,

---

[2] Judges Edith H. Jones and Rhesa H. Barksdale were recused.

[3] Under Texas law, a trial court's judgment is final thirty days from the date a motion for new trail is overruled. Tex. R. Civ. P. 329b(d). In the present case, the trial court entered the judgment on May 26, 1987. A motion for new trial was filed on June 25, 1987.

and disregards the procedural track of general removal statutes.

Although FIRREA specifically provides that actions involving the FDIC arise under the laws of the United States; this grant of authority does not empower the FDIC to remove a case from a state appellate court at any time in the appellate process. See 12 U.S.C. §1819(b)(2)(A). The language of FIRREA must be considered in conjunction with the limitations of a federal court's power. The congressional intent of FIRREA was to create federal question jurisdiction in any suit involving the FDIC, and to permit removal *provided that* the federal district court could exercise original jurisdiction consistent with established rules of federal procedural law and substantive constitutional principles.

The En Banc majority opinion of the Fifth Circuit Court of Appeals ignored settled rules of statutory construction, as well as federal procedural and constitutional law, in permitting the FDIC carte blanche authority to remove an action in the state appellate process at any time without regard to existing principles of law. Thus, the Honorable Court must correct the clearly erroneous holding of the Fifth Circuit Court of Appeals, and resolve these important questions of federal statutory and constitutional law.

A. Congress Intended FIRREA to Rely Upon General Removal Statutes Which Provide No Basis for Federal Court Jurisdiction Over Cases Pending in a State Appellate Court.

Congress certainly did not intend, by enacting FIRREA, to grant the FDIC removal powers which could be

---

The trial court lost plenary power over the suit on September 9, 1987--30 days after the motion for new trial was denied. Even under federal guidelines, a federal district court lost the ability to alter the verdict on May 26, 1988, one year after the state judgment was entered. Fed. R. Civ. P. 60.

exercised in complete derogation of established rules governing removal without expressly stating its legislative intention to do so. Indeed this Court has held, that the normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it must make that intent specific. *Midlantic Nat'l Bank v. New Jersey Dept. of Env't Protection*, 474 U.S. 494 (1986). This Court further held, "(s)tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Isbrandtsen v. Johnson*, 343 U.S. 779, 783 (1952). As this court stated on May 26, 1992:

> As we emphasized only last Term, however, concerns of federalism require us to give a narrow construction to federal legislation in such sensitive areas unless Congress' contrary intent is "unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 510 U.S. ---,----, 111 S. Ct. 2395, 2401 (1991) (internal quotation marks omitted). This plain statement rule is nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.

Id., as quoted in Evans v. U.S., -- U.S. --, 112 S. Ct. 1881, 1901 (1992).

The only sensible reading of the FIRREA removal statute is that Congress clearly intended the general removal principles to provide the requisite procedural guidance for determining when removal is proper.

The FDIC's argument that FIRREA grants FDIC removal power wholly independent of the general removal provision, has been rejected by the First Circuit Court of Appeals based on these axiomatic principles of statutory

construction. In *Woburn Five Cents Sav. Bank*, the Court of Appeals in holding that the 30-day time limitation contained in § 1446(b) applied in construing FIRREA's § 1819(b)(2)(B), cogently explained:

> Finally, we think it inconceivable that Congress, without any explicit statement, intended such a drastic departure from existing practice. The FDIC for years has been required to adhere to the procedures set forth in the general removal statute. If Congress had intended to render that statute inapplicable and to leave FDIC removal procedures up to the discretion of individual judges, surely it would have said so explicitly. (citation omitted)
>
> . . .
>
> In the absence of any other specified procedure, logic dictates that FDIC removals continue to be governed by the same general removal principles that govern any other removal.

Woburn Five Cents Sav. Bank v. Robert M. Hicks, Inc., 930 F.2d 965, 968 (1st. Cir. 1991).

It is important to remember that the underlying dispute does not involve a federal question, but only issues of state law. General removal principles would not allow the FDIC to remove this case to federal court,[4] thus creating perforce FDIC's specious argument that the removal provision of FIRREA authorizes a separate and independent procedural

---

[4] The en banc majority opinion declined to decide this case under general removal provisions. *See In re Meyerland Co.*, 960 F.2d 512, 515 n.5 (5th Cir. 1992). The court did note, however, that the FDIC could not remove the dispute under 28 U.S.C. § 1441. *Id.* Additionally, the majority questioned whether the FDIC could utilize this provision in any case. *Id.*

track. Only by reconciling FIRREA's removal provision with the general principles of law governing removal is the congressional intent of FIRREA's removal statute harmonized with the requisite limitations imposed on the federal court's power.

1. The federal district court does not have original jurisdiction over the dispute, which is required by general removal statutes.

In order to be removable, a case must be one over which the federal district court has original jurisdiction. 28 U.S.C. § 1441(a). A federal district court has original, not appellate, jurisdiction over cases and controversies arising under the laws of the United States. 28 U.S.C. § 1331; *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *Dist. of Columbia Ct. of Appeals v. Feldman*, 460 U.S. 462 (1983). Indeed, in the words of this Court, "(l)ower federal courts *possess no power whatever* to sit in direct review of state court decisions." *Atlantic Coast Line Ry. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 296 (1970) (emphasis added). Restrictions on removal jurisdiction serve to ensure that a federal forum will operate as intended--as a court of limited jurisdiction. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 942 (1983).

The federal district court can not exercise original jurisdiction over this dispute because the state trial court's plenary power jurisdiction over the matter ended 13 months before the case was removed. Tex. R. Civ. P. 329b(d); *Transamerica Leasing Co. v. Three Bears Inc.*, 567 S.W.2d 799, 800 (Tex. 1978). The federal court's power relies upon and flows from the state court's power. The filing of a notice of appeal is an event of jurisdictional significance which divests the district court of control over a case as well as jurisdiction. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982); *Alpert v. Resolution Trust Corp.*, No.

CIV. A. 91-B-1907 (D.Colo. June 19, 1992). The original jurisdiction requirement of the general removal statutes likewise precludes a federal district court from relitigating the facts of the present case.

2. If Congress had intended to depart from the ordinary removal procedural requirements, it would have explicitly done so.

The FDIC contends that in enacting FIRREA, Congress created a totally new power authorizing the removal of a case on the eve of a state appellate court decision. However, both the FDIC and the Fifth Circuit fail to address why Congress enumerated specific exceptions to general removal provisions if it in fact intended to create a wholly independent procedural track. It would be unnecessary for Congress to make specific exclusions if Congress had not intended for the general removal principles to apply in all circumstances. *Woburn*, 930 F.2d at 968; *Federal Deposit Ins. Corp. v. Loyd*, 955 F.2d 316 (5th Cir. 1992); *Federal Deposit Ins. Corp. v. Norwood*, 726 F. Supp. 1073 (S.D. Tex. 1989). Congress gave the FDIC a number of procedural advantages through specific exceptions to the general removal statutes. Through these exceptions, the FDIC:

i) may appeal remand orders. *See* 12 U.S.C. § 1819(b)(2)(C). Ordinarily, remand orders are not appealable. 28 U.S.C. § 1447(d) (1984).

ii) may appeal regardless of whether it is the plaintiff or the defendant in the suit. *See* 12 U.S.C. § 1819(b)(1)(A). General removal statutes only permit removal by defendants. *See In re Franklin National Bank Securities Litigation*, 532 F.2d

842, 845-46 (2d Cir. 1976).

iii) may file a notice of removal within ninety days of the date it inherits the claim of the failed savings institution. *See* 12 U.S.C. § 1819(b)(2)(B). Typically, a substituted party only has thirty days to file a notice of removal.[5] *See* 28 U.S.C. § 1446(b) (1984).

iv) need not file a bond or security to remove a case. *See* 12 U.S.C. § 1819(b)(2)(B). Until 1988, the FDIC had been required to post bond or security. Judicial Improvements and Access to Justice Act. Pub. L. No. 100-702, 1988.

These specific exceptions from the general procedural rules conspicuously illustrate the congressional intent behind FIRREA. Firmly established procedural rules control when no exceptions are explicitly drawn by Congress. *Midlantic Nat'l Bank*, 474 U.S. 494; *Lazuka v. Federal Deposit Ins. Corp.*, 931 F.2d 1530, 1536 (11th Cir. 1991).

Apart from the specific exceptions, congressional intent can also be understood by looking to references made to general removal principles. For example, the word "appropriate" in 12 U.S.C. § 1819(b)(2)(B) necessarily refers

---

[5] This provision was amended on December 19, 1991. FDIC Improvement Act, Pub. L. No. 102-242 §161, 105 Stat. 2285 (1991). In the original enactment of FIRREA, the RTC was given the ability to file a notice of appeal within a ninety day period. The FDIC was not given this benefit and therefore was subject to the general removal time limit of thirty days. However, Congress responded by enlarging the period of time to ninety (90) days. Why would this amendment be necessary if FIRREA did not intend to otherwise rely upon general removal statutes?

to the venue provision of the general removal statute, 28 U.S.C. § 1441(a), because "appropriate" is not defined in FIRREA. *Woburn*, 930 F.2d at 968.

These specific departures from established procedural requirements clearly demonstrate the congressional intent to rely upon general removal provisions.

B. FIRREA Provides No Basis for Federal Court Jurisdiction Over Cases Pending in a State Appellate Court.

The FDIC convinced the Fifth Circuit majority to speculate and create an independent track which would mandate a federal district court to "rubber stamp" the decision of the state trial court or even more incredibly, to allow the federal district court to vacate the final state court judgment altogether. *In re Meyerland Co.*, 960 F.2d 512, 525, n. 8 (5th Cir. 1992). Neither of these approaches is based upon the language or legislative history of FIRREA.

The FDIC cites two provisions of FIRREA which purportedly allow federal court removal regardless of the procedural status of the case within the state judicial process. They are:

i) 12 U.S.C. § 1819(b)(2), which provides that "**the Corporation may . . . remove any action, suit, or proceeding** from a State court to the appropriate United States district court (emphasis added)"; and

ii) 12 U.S.C. § 1821(d)(13)(i), which provides that "(i)n the event of any appealable judgment, the Corporation as conservator or receiver shall have all the rights and remedies available to the insured depository institution (before the appointment of such conservator or

> receiver) and the Corporation in its corporate capacity, including removal to federal court and all appellate rights . . ."

Contrary to the Fifth Circuit's holding, neither provision creates "out of whole cloth" a new category of federal district court possessing original appellate jurisdiction. Under the circumstances of this case, the federal district court was powerless to exercise any meaningful original jurisdiction over the case, and Judge Hoyt was correct in remanding the case back to the state appellate court.

1. The language of 12 U.S.C. § 1819(b)(2) does not authorize the removal of an action after the state trial court loses plenary power over the action.

The gravamen of the Fifth Circuit's majority en banc opinion relies principally on the word "any" to support its conclusion that a case can be removed at any stage of the state appellate process. This language does not refer to the procedural status of the litigation. Instead, as the dissent correctly elucidates, it refers to the types of cases which the FDIC may remove to federal court. *In re Matter of Meyerland Co.*, 960 F.2d at 523. This language does nothing more than expand the federal court's subject matter jurisdiction to permit the FDIC to bring actions which, because of their subject matter, would ordinarily have been matters for the state courts. *See Carrollton Farmers Branch Independent School Dist. v. Johnson & Cravens*, 889 F.2d 571, 572 (5th Cir. 1989), *on remand to*, 776 F. Supp. 1180 (N.D. Tex. 1991).

The FDIC's contention that "any" means cases of any procedural posture as well as any subject matter, also conflicts with the legislative intent behind FIRREA. When FIRREA's removal provision was first submitted as an amendment in the House of Representatives, it was described as vesting in the

FDIC only "the authority to remove **certain** state court proceedings to federal court." H.R. Rep. No. 54(I), 101st Cong., 1st Sess., reprinted in 1989 U.S.Code Cong. & Admin. News 86, 124-25 (discussing H.R. 1278, 101st Cong., 1st Sess. (version 2 of May 18, 1989)) (emphasis added). "Certain" state court proceedings does not mean any state court proceedings. Congress intended to limit the FDIC's ability to remove only those cases over which a federal district court had some meaningful original jurisdiction. This approach harmonizes the language of 12 U.S.C. § 1819(b)(2)(B) with the intent of Congress in passing FIRREA.

The cases relied on by the majority opinion of the Fifth Circuit Court of Appeals as supporting post-judgment removal are easily distinguished from this case. Each and every case cited by the Fifth Circuit in the en banc opinion are ones over which the state trial court still could exercise some meaningful original jurisdiction.[6] While some of the cases cited involved

---

[6] *Beighley v. Federal Deposit Ins. Corp.*, 868 F.2d 776 (5th Cir. 1989) (motions to vacate the judgment and for a new trial were still pending in state trial court when the suit was removed, so district court still had power to grant Rule 60 relief); *In re Savers Federal Sav. & Loan Ass'n*, 872 F.2d 963 (11th Cir. 1989) (no appeal filed as of yet and Rule 60 relief was still available); *Federal Deposit Ins. Corp. v. Taylor*, 727 F. Supp. 326, 328 (S.D. Tex. 1989) (judgment entered Jan. 27, 1989 and case removed an April 26, 1989); *Union Federal Bank of Indianapolis v. Minyard*, 919 F.2d 335 (5th Cir. 1990) (motion for new trial was pending when removed); *Murray v. Ford Motor Co.*, 770 F.2d 461 (5th Cir. 1985) (Rule 60(b)(1) relief was still available); *Northshore Development, Inc. v. Lee*, 835 F.2d 580 (5th Cir. 1988) (FSLIC was seeking 60(b) relief); *Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890 (5th Cir. 1984) (district court set aside default judgment); *Federal Deposit Ins. Corp. v. Ritchie*, 646 F. Supp. 1581 (D. Neb. 1986) (district court found relief to set aside judgment was still available); *Munsey v. Testworth Laboratories*, 227 F.2d 902 (6th Cir. 1955) (district court set aside default judgment); *Vernon Sav. and Loan Ass'n v. Commerce Sav. and Loan Ass'n*, 677 F. Supp. 495

actions pending in a state appellate court,[7] in each of those cases, the time had not yet expired for the trial court to grant relief from the final judgment. Because the trial court could have altered, vacated, or otherwise reconsidered the judgment, those cases could be properly removed. *Ward v. Resolution Trust Corp.*, 91-3015EA (8th Cir. July 30, 1992) (Rule 60(b) yet to be ruled on by the federal district court).

In our case, due to the amount of time that passed since judgment was entered, the federal district court could no longer exercise any original jurisdictional powers under Rule 60(b). This is the distinction drawn by Chief Judge Politz and four other members of the Fifth Circuit in their dissenting opinion. *In re Meyerland Co.*, 960 F.2d 512, 526 (5th Cir. 1992). The district court, and the dissenting members of the Fifth Circuit, correctly recognized that a case can not be removed to federal court once the district court loses the power to reconsider the merits of the state claims under Rule 60(b) of the Federal Rules of Civil Procedure.[8] As such,

---

(N.D. Tex. 1988) (removed prior to case determination on the merits).

[7] *Federal Deposit Ins. Corp. v. Yancey Camp Development*, 889 F.2d 647 (5th Cir. 1989) (could still be vacated under Rule 60(b) at time of removal); *Jackson v. American Sav. Mortg. Corp.*, 924 F.2d 195 (11th Cir. 1991) (judgment entered March 20, 1989, case removed on June 21, 1989, Rule 60 relief still available); *Addison Airport of Texas, Inc. v. Eagle Investment Co.*, 691 F.Supp. 1022 (N.D. Tex. 1988) (removed a de novo appeal from state county court).

[8] Rule 59 of the Federal Rules of Civil Procedure sets a ten day time limit from the date judgment was entered to file a motion for new trial, for a judgment non obstento verdicto or for an amendment to the judgment. Rule 60(b) of the Federal Rules of Civil Procedure places a one-year limitation from the date of judgment for a party to file a motion for relief from a judgment. Rule 6(b) of the Federal Rules of Civil Procedure provides that the court may not extend the time limitations set forth in either Rule 59 or Rule 60. The only exception to the mandatory provisions of Rule 6(b) is for "unique circumstances."

Judge Hoyt properly remanded the case to the state appellate court.

2. An action pending in a state appellate court is not "appealable" within the meaning of 12 U.S.C. § 1821(d)(13).

The FDIC has wrongfully asserted that this provision independently allows for removal jurisdiction over matters pending in state appellate courts. Judge Duhe' admitted § 1821(d)(13) does not establish that the FDIC may remove a case on appeal. *In re Meyerland Co.*, 960 F.2d 512, 516 n. 7 (5th Cir. 1992).

A clear reading of the statute fails to support the FDIC's position as it specifically requires the FDIC to "abide by a final unappealable judgment of any court of competent jurisdiction which was *rendered before the appointment of the Corporation* as receiver" (emphasis added). 12 U.S.C. § 1821(d)(13). Subsection B of the provision provides that, with respect to an "appealable" judgment, the FDIC has the same rights of the insured institution before appointment of the receiver, "including removal to federal court and all appellate rights."

In FIRREA, the proper construction of "appealable" necessarily refers to the **capacity** for appeal, not the **existence** of a prior appeal. The only judgment which may be removed for further proceedings in federal court is one from which the time for appeal has not already expired. In the present case, the time for appeal had expired 13 months prior to the FSLIC's intervention in this dispute. Tex. R. App. P. 46.

Under this exception, a party who has detrimentally relied on action taken by the Court and as a result of that reliance has missed the relevant time deadlines may be granted additional time to file a motion. See *Thompson v. Immigration and Naturalization Service*, 375 U.S. 384 (1964), *on remand to*, 323 F.2d 167 (7th Cir. 1964). These conditions are not present here.

Additionally, the term "appellate rights" refers to state as well as federal appeals. These rights depend upon the posture of the case at the time of removal. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters and Auto Truck Drivers Local No. 70 of Alameda County*, 415 U.S. 423 (1974). If at the time of removal, the state court judgment is appealable, but has not yet been appealed, appellate rights may be pursued in either the state or federal system. If, however, the case has already been appealed in the state court system, the "appellate rights" refers to those being pursued in state appellate courts. *Griggs*, 459 U.S. at 58. In the present case, the failed savings institution did not have any removal rights, but chose to exercise its state appellate rights prior to the receivership.

The legislative history behind 12 U.S.C. § 1821(d)(13) also illustrates the congressional intent of Congress in passing this provision. Section 212 of FIRREA, now codified at 12 U.S.C. § 1821(d)(13), includes the following language:

> Section 212(5) defines the FDIC's authorities and duties as conservator or receiver. The authorities essentially parallel those heretofore exercised by the FSLIC and the FDIC, and are designed to give the FDIC power to take all action necessary to resolve the problems posed by a financial institution in default.

House Report 101-54(I), p. 330, U.S.Code Congressional and Administrative News, 101st Cong. 1989, Vol. 2, p. 330. This indicates Congress intended FIRREA to continue, not expand, the powers the FSLIC and the FDIC had previously exercised.

The failed savings institution could not remove the case to federal court before the FDIC intervened. The FDIC inherits whatever rights the insured bank has on appeal, and no more. Since an insured bank has no power to remove a pending appeal, neither can the FDIC. *Federal Deposit*

Ins. Corp. v. Sellards, 731 F. Supp. 1300 (N.D. Tex. 1990). The reasoning of the Fifth Circuit departs from the normal course of judicial proceedings and highlights the appropriateness of review of this important question of federal law.

II. IN THE ALTERNATIVE, THE FIFTH CIRCUIT ERRONEOUSLY HELD THAT THE UNITED STATES CONSTITUTION ALLOWED A FEDERAL DISTRICT COURT TO EXERCISE REMOVAL JURISDICTION OVER A CASE PENDING IN ANY PHASE OF A STATE APPELLATE PROCESS.

If FIRREA stands for the legal proposition advanced by the FDIC and upheld by the Fifth Circuit Court of Appeals, the statute is repugnant to the United States Constitution. Lower federal courts possess no power to sit in direct review of state court decisions. *Atlantic Coast Line Ry. Co. v. Brotherhood of Locomotive Eng'rs.*, 398 U.S. 281 (1970). In fact, the only federal tribunal with the power to sit in review of state court judgments is this Honorable Court.

When the case is removed to a federal district court and the state court can no longer exercise original jurisdiction, the district court can be nothing more than a "rubber stamp" on the state court action. This is not a constitutional function of a United States District Court. Nevertheless, the Fifth Circuit offered two alternatives to circumvent this constitutional deficiency. First, a federal district court could blindly adopt the judgment of the state district court as its own. Second, a federal district court could entertain a Rule 59 or Rule 60 motion for relief from the state

court judgment.

Both approaches gloss over the constitutional impediments posed by the facts of this case. The state trial court entered the judgment on May 26, 1987. This case was not removed by the FDIC until September 7, 1989.[9] As a result of the passage of time, Rule 59 and Rule 60 relief is not available. The trial court, and therefore the federal district court, is without any meaningful original jurisdiction.

Federal courts are courts of limited jurisdiction. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Immigration and Naturalization Serv. v. Chadha* at 942. They may only exercise that power authorized by Article III of the United States Constitution, and those specific statutes enacted by Congress pursuant to Article III. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534 (1985). Unless a dispute falls within the confines of the jurisdiction conferred by Article III and Congress, the federal court has no authority to issue any orders regarding its resolution. *Giannakos v. M/V Bravo Trader*, 762 F.2d 1295 (5th Cir. 1985). Additionally, a statute conferring federal removal jurisdiction must comport with the protection afforded by other provisions of the Constitution.

This Court has created rules of justiciability which further limit the jurisdiction of the federal court. In defining the subject matter jurisdiction of federal courts, Article III provides that a federal court can only consider the merits of a case or controversy. This Court has defined "case" and "controversy" by looking to the concepts of justiciability, such as standing, mootness, ripeness, and abstention. These principles require a federal district court to refrain from considering the merits of an appeal. This Court has fashioned such doctrines as self-imposed restraints on the federal courts in deference to the constitutional authority of the states. *Atlantic Coast Line*, 398 U.S. 281; *see also Evans*, *supra*

---

[9] This case was first removed by FSLIC on October 26, 1988, and remanded to the state appellate court on April 24, 1989.

at 16.

Under the procedures established by the Fifth Circuit for removed "appeals," no justiciable case or controversy would be presented to the federal district court. The district court would have no power to act on the removed "appeal" in any meaningful fashion. The district court would only adopt the actions of the state court rendering the judgment in question, regardless of whether that judgment was appropriate or allowed by law. Thus, a federal district court could be presented with an unconstitutional application of law and have absolutely no choice but to accept the state court's judgment as its own.

A. Concepts of Comity and Federalism Require that a Federal Court Refrain from Exercising Appellate Jurisdiction Over Final State Court Judgments.

One of the benefits of our dual court system is the principle that a federal court will give "full faith and credit" to judgments from state courts. U.S. Const. art. IV, § 1. Ordinarily, this concept ensures that a citizen from one state will enjoy the same general rights in another state. However, it also prevents a federal court from ignoring the res judicata effect of a state court action in a federal forum. *See Kremer v. Chemical Const. Corp.*, 456 U.S. 461 (1982), *reh'g denied*, 458 U.S. 1133 (1982). A federal court should accept the rules chosen by a state court from which the appeal is taken. *Mills v. Duryee*, 11 U.S. (7 Cranch) 481 (1813).

This constitutional principle ensures that a federal court should give the same preclusive effect to a state court judgment as another court of that state would give. *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 523 (1986), *on remand to*, 758 F.2d 929 (11th Cir. 1986), *on remand to*, NO. Civ. A. 83V-181-N (M.S. Ala., 1986), *j. aff'd*, 825 F.2d 1475 (11th Cir. 1987), *cert. denied*, 484 U.S. 1060 (1988). Federal courts may not "employ their own rules of res judicata in determining the effects of state court judgments.'" *Id.* at 523. The Constitution demands a federal court accept

the rules chosen by the State from which the judgment is taken. *Id.*, at 523 (*quoting Kremer*, 456 U.S. at 461).

In Texas, this case could not be retried on the merits unless the case was remanded back to the trial court. The issues would be barred by the doctrine of res judicata and collateral estoppel. *Mitchell v. Carter*, 545 S.W.2d 869 (Tex.Civ.App.--Waco 1977); *Corpus Christi Taxpayers Ass'n v. City of Corpus Christi, Texas*, 858 F.2d 973 (5th Cir. 1988), *reh'g denied*, 860 F.2d 437, *cert. dism'd*, 490 U.S. 1032, *cert. denied*, 490 U.S. 1065. Under the full faith and credit clause of Article IV § 1, both sister state and federal courts should defer to Texas' ability to make substantive decisions about its own laws. *See Federal Savings and Loan Ins. Corp. v. Templeton*, 700 F. Supp. 456 (S.D. Ind., 1988).

Texas' interests in enforcing its judgments are so important that the exercise of federal power would disregard the comity between states and the national government. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 603 (1975), *reh'g denied*, 421 U.S. 971 (1975); *Coyle v. Oklahoma*, 221 U.S. 559, 565 (1911); *Marcal Paper Mills, Inc. v. Ewing*, 790 F.2d 195, 196 (1st Cir. 1986). The Fifth Circuit refused to defer to Texas' right to determine its own substantive law and instead returned the case to federal district court, contradicting this Court's holdings in both *Gregory* and *Evans*. The Fifth Circuit has failed to give full faith and credit to the judgment of the Texas courts and has forced the parties to begin anew in federal court. This constitutional infirmity in the Fifth Circuit's holding begs review of this decision.

B. The Tenth Amendment Obligates Congress and Federal Courts to Respect a Final State Court Judgment

Any exercise of jurisdiction over final state court judgments would necessarily violate the provisions of the Tenth Amendment:

> The powers not delegated to the United States

> by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. X.

The Fifth Circuit has forced United States District Judge Hoyt to ignore the finality of the state judgment and reexamine the validity of the verdict rendered by a jury. This severely impacts a state's right of sovereignty under the Tenth Amendment to protect its citizens and enforce the judgments of its court system.

This is a case of great concern for states in our federalist system as it questions the ability of a state to protect its judicial system by enforcing its judgments. If a federal court is free to disregard the preclusive effect of a final state court judgment, then the principles behind the Tenth Amendment are completely ignored. Indeed the very concepts of constitutional law and federalism are called into question, as enunciated in *Evans v. U.S.*, 112 S.Ct. 1881, 1901 (1992).

C. The Seventh Amendment Precludes Federal Reexamination of a Final State Judgment.

The Fifth Circuit's decision violates protection afforded by the Seventh Amendment:

> [N]o fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

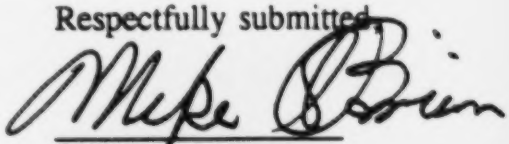
U.S. Const. amend. VII. By allowing removal after the case has already been tried by a state jury, the Fifth Circuit permits lower federal courts to reexamine the judgment. The common law recognizes only two modes by which facts may be reexamined: the granting of a motion for new trial; and the award of a venire facias de novo. *See Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. (3 Pet.) 433 (1830). Neither

is present here. As there is no basis for the lower federal court to reexamine facts tried by the jury, the Fifth Circuit erroneously authorized the federal district court to reconsider facts previously resolved by the state trial court and jury in violation of the Seventh Amendment to the United States Constitution.

CONCLUSION

This Court should review the Fifth Circuit's judgment and en banc opinion. General removal statutes and the language of FIRREA fail to confer removal jurisdiction over actions pending in state appellate courts two years and three months after a final state judgment has been entered. Additionally, even if Congress intended this absurd result, such a procedural track would necessarily violate provisions of the United States Constitution. As such, petitioners respectfully request that this Court review the Fifth Circuit's judgment and en banc opinion.

Respectfully submitted,



MIKE O'BRIEN
Mike O'Brien, P.C.
440 Louisiana
Suite 2300
Houston, Texas 77002
Tel. (713) 222-0088
FAX (713) 222-6903

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this petition for writ of certiorari of MEYERLAND COMPANY and WILLIAM MICHAEL ADKINSON was sent by first class mail, postage pre-paid on this 11th day of August, 1992 to all counsel of record.

MIKE O'BRIEN

TABLE OF APPENDICES

APPENDIX A
En Banc Opinion 1

APPENDIX B
Trial Court Judgment 31

APPENDIX C
Order of Remand 44

APPENDIX D
Order Remanding Case 46

APPENDIX E
Order for Stay Pending Reconsideration 48

APPENDIX F
Order Denying Appeal 50

APPENDIX G
Panel Opinion 52

APPENDIX H
Order of Rehearing En Banc 74

APPENDIX I
Order Dismissing Appeal for
Want of Jurisdiction 76

APPENDIX J
Judgment on Rehearing En Banc 78

APPENDIX K
Fed. R. Civ. P. 6 80

APPENDIX L
Fed. R. Civ. Pro. 59 81

APPENDIX M
Fed. R. Civ. P. 60 82

APPENDIX N
28 USC § 1345 84

APPENDIX O
28 USC § 1441 85

APPENDIX P
28 USC § 1446 87

APPENDIX Q
28 USC § 1447 90

APPENDIX R
28 USC § 1257 92

APPENDIX S
12 USC § 1819 93

APPENDIX T
12 USC § 1821(d)(13) 97

(APPENDIX A)

En Banc Opinion

IN THE MATTER OF MEYERLAND CO., and William M. Adkinson, Debtors,

FEDERAL DEPOSIT INSURANCE CORP.
as Manager of the FSLIC Resolution Fund
as Receiver for Continental Savings Association,
Appellant,
v.
MEYERLAND CO., and William Adkinson,
Appellees.

United States Court of Appeals, Fifth Circuit.
No. 89-6118
May 13, 1992

Appeal from the United States District Court
For the Southern District of Texas.

Before Politz, Chief Judge, REYNALDO G. GARZA, KING, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, SMITH, DUHE, WIENER, EMILIO M. GARZA and DeMOSS, Circuit Judges.[1]

DUHE', Circuit Judge:

---

[1] Judges Edith H. Jones and Rhesa H. Barksdale are recused.

Proceedings Below and Appellate Jurisdiction

Meyerland Co. and William M. Adkinson sued Continental Savings Association ("Continental") for, among other things, usury and fraud in state court. Continental counterclaimed for fraud and breach of contract. The trial court awarded Continental $30,031,089.99 and Adkinson $1,124,109.59 in damages. Meyerland and Adkinson appealed.

After the appeal was filed, the Federal Home Loan Bank Board declared Continental insolvent and appointed the Federal Savings and Loan Insurance Corporation (FSLIC) as receiver. The FSLIC removed to federal district court which remanded on April 21, 1989.

On August 9, 1989, the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA), Pub.L.101-73, 103 Stat. 183, 383 was enacted. The Federal Deposit Insurance Corporation (FDIC) succeeded the FSLIC as the receiver of Continental and the FDIC then removed this case on September 7, 1989 under § 209(4) of FIRREA (12 U.S.C. § 1819(b)(2)(B)).[2] The district court again remanded and awarded the appellees $2,500 in sanctions.

The FDIC appeals. Although remand orders are generally not appealable, 12 U.S.C. § 1819(b)(2)(C)

---

[2] Although the FIRREA was enacted after the current proceeding was initiated, it is clear that the FDIC may utilize it. See *Turboff v. Merrill Lynch, Pierce, Fenner, & Smith*, 867 F.2d 1518, 1521 (5th Cir. 1989). ("When Congress adopts statutory changes while a suit is pending, the effect of which is not to eliminate a substantive right but rather to change the tribunal which will hear the case, those changes-barring specifically expressed intent to the contrary-will have immediate effect.") (*citing Hallowell v. Commons*, 239 U.S. 506, 36 S.Ct. 202, 60 L.Ed. 409 (1916)) and *In re Resolution Trust Corp.*, 888 F.2d 57, 58 (8th Cir.1989).

authorizes an appeal in this case. This appeal presents two issues: (1) Whether 12 U.S.C. §1819(b)(2) authorizes the FDIC to remove a state court appellate proceeding; and (2) Whether the district court erred in awarding sanctions.

I. Removal Power Under FIRREA

Congress enacted FIRREA, a broad revision in federal banking law, in response to the recent and ongoing savings and loan crisis. *See Meliezer v. RTC*, 952 F.2d 879, 881 (5th Cir.1992); *Smallwood v. OTS*, 925 F.2d 894, 898 (6th Cir.1991). One of the ways FIRREA addresses the problems facing this nation's thrift institutions is through "provisions which expand, enhance and clarify enforcement powers of the financial institution regulatory agencies." H.Rep. No. 101-54(1), 101st Cong., 1st Sess. 291, 311, reprinted in 1989 U.S.Code Cong. & Admin.News 86, 107. Specifically, FIRREA greatly expands the FDIC's role in regulation and supervising such institutions. Id. at 310-11, reprinted in 1989 U.S.Code Cong. & Admin.News at 106-07. See also Note, The FDIC's Enhanced Powers Over Savings Associations: Does FIRREA Make It "SAIF"?, 59 Ford.L.Rev. S381, S382 (1991).

This case requires us to examine the extent of the FDIC's powers under FIRREA. At issue are jurisdictional and removal provisions giving the FDIC broad power to gain access to federal courts in actions to which it is a party pursuant to FIRREA. The provisions relation to removal, found in 12 U.S.C. § 1819(b)(2), read as follows:

> (A) In general
> Except as provided in subparagraph (D), all suits of a civil nature at common law or in equity to which the Corporation, in any capacity, is a party shall be deemed to arise under the laws of the United States.

> (B) Removal
> Except as provided in subparagraph (D), the Corporation may, without bond or security, remove any such action, suit or proceeding from a state court to the appropriate United States district court (emphasis supplied).[3]

The power conferred by FIRREA to invoke federal jurisdiction and to remove from state court is substantial. *See Carrollton--Farmers Branch Independent School District v. Johnson & Cravens*, 889 F.2d 571, 572 (5th Cir.1989). *See also Jameson v. FDIC*, 931 F.2d 290, 291 (5th Cir.1991) (FIRREA extends FDIC's jurisdiction to include persons no longer affiliated with insured institutions); *FDIC v. Griffin*, 935 F.2d 691, 696 (5th Cir.1991) *cert. denied*, -- U.S.--, 112 S.Ct. 1163, 117 L.Ed.2d 410 (1992) (allowing federal jurisdiction even when FDIC has been voluntarily dismissed as a party). Access to federal courts in all actions to which it is a party allows the FDIC to develop and rely on a national and uniform body of law, consistent with eliminating the problems identified by Congress in having less rigorous state standards coexisting with federal ones.[4] *See Smallwood v.*

---

[3] 12 U.S.C. §1819(b)(2)(D), which relates to situations in which state, as opposed to federal, authorities appoint the FDIC as receiver, which involve only a state depository insurance system, and which require only the interpretation of state law, does not apply to this case.

While this matter was pending before us, § (b)(2)(B) was amended to add at the end thereof the following: "before the end of the 90-day period beginning on the date the action, suit or proceeding is filed against the Corporation or the Corporation is substituted as a party."

[4] The House Report on FIRREA explained the problem with having federal and state regulatory systems simultaneously supervising thrift institutions: "In addition to having greater powers, many state-

Office of Thrift Supervision, 925 F.2d at 898 ("We read many portions of the FIRREA as establishing the primacy of the Federal interest as regards the solvency and viability of the Federal deposit insurance system.").

In the case before us, first FSLIC and then the FDIC sought removal from state to federal court, FSLIC under 12 U.S.C. § 1730(k)(1) (repealed by FIRREA) and the FDIC under 12 U.S.C. § 1819(b)(2)(B), after a state court judgment had been entered, without seeking relief from judgment under Fed.R.Civ.P. 60, and while the case was on appeal to the appropriate state appellate court. In each case, the federal district court remanded to state court, concluding that neither FIRREA nor 28 U.S.C. §§ 1441-51, the general removal statutes, authorized removal at this stage of the proceedings.

Although it is not clear whether the general removal statutes permit appellate removal,[5] the dissent relies upon the

---

chartered thrifts found a far less rigorous regulatory and supervisory environment at the state level ... As long as the federal government was responsible for picking up the tab for a failed state-chartered thrift, there was no great incentive for many state legislatures to deny the sweeping demands for additional investment powers made by the thrift industry. The results were tragic. Seventy percent of all FSLIC expenditures during 1988 went to pay for problems created by high-risk, ill-supervised, state-chartered thrifts in California and Texas. Those same two states absorbed 54 percent of FSLIC expenditures in 1987." H.Rep. No. 101-54(I), 101st Cong., 1st Sess. at 297, reprinted in 1989 U.S.Code Cong. & Admin.News at 93.

[5] We do not decide whether this type of removal would be proper under 28 U.S.C. § 1441. First, the FDIC could not remove the instant case under § 1441. The dispute hinges on state law and, thus, there is no federal question jurisdiction. Second, it is uncertain whether the FDIC may utilize § 1441 to effectuate removal in any case, not just the present one. In *FDIC v. Sumner Financial Corp.*, 602 F.2d 670 (5th Cir.1979) we held that the predecessor statute to 12 U.S.C. § 1819(b)(2) was a complete jurisdictional scheme and that both original

rule that federal district courts lack jurisdiction to review final state court judgments to support their position that § 1819 does not permit it. Specifically, they rely on *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476, 103 S.Ct. 1303, 1311, 75 L.Ed.2d 206 (1983), and *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923). Their reliance is misplaced. Under the *Rooker-Feldman* line of cases, federal statute defines "final state court judgments" as those "rendered by the highest court of a state in which a decision could be had." 28 U.S.C. §1257(a). The judgment of the Texas state district court is not a "final" judgment within this definition. Two higher courts within the state judiciary could hear appeals. *See Market St. Ry. Co. v. Railroad Commission of State of California*, 324 U.S. 548, 551, 65 S.Ct. 770,772, 89 L.Ed. 1171 (1945) (a state judgment is final (1) if it is an effective determination of litigation in that it is not an interlocutory or intermediate judgment and (2) when it is subject to no further review or correction in any other state tribunal).[6]

---

and removal jurisdiction over the FDIC was proper only if the case fell within the ambit of § 1819. *Id.* at 677-80. *See also FDIC v. Elefant*, 790 F.2d 661 (7th Cir.1986). It is not entirely clear, however, that *Sumner* is still good law. In *FSLIC v. Ticktin*, 490 U.S. 82, 109 S.Ct. 1626, 104 L.Ed.2d 73 (1989) the Supreme Court held that the statute granting jurisdiction over FSLIC, 12 U.S.C. § 1730(k)(1), was not exclusive and did not preclude the exercise of jurisdiction under other grants of jurisdiction. The FSLIC jurisdictional statute was very similar to the statutory predecessor to the FDIC jurisdictional statute, and *Ticktin*, therefore calls into question the result in *Sumner*.

[6] Furthermore, the modern view of removal is that it is more closely akin to original than to appellate jurisdiction because once the case is removed, it is treated as if it had commenced in federal court. *See Freeman v. Bee Machine Co.*, 319 U.S. 448, 452, *rehearing denied*, 320 U.S. 809, 64 S.Ct. 27, 88 L.Ed. 489 (1943), and *Savell*

The FDIC directs us to the broad language of § 1819 in arguing that the statute authorizes removal in this case. Under this reasoning, because the statute does not specifically prohibit appellate removal, it authorizes it. Appellees, on the other hand, insist that the language is so broad that the statute is silent on this issue and that the FDIC should not be able to remove cases at this stage of state proceedings. To resolve this issue, we must look to the plain language and meaning of FIRREA, the Constitutional authority of Congress to grant this sort of removal jurisdiction, and whether there is any reason to think that Congress could not have intended this result.

A. Plain Meaning of the Statute.

As in any case requiring statutory construction, the High Court has instructed us to adhere to the plain language of the law unless "literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973 (1982). The Supreme Court recently re-affirmed this standard in *Demarest v. Manspeaker*, which involved 28 U.S.C. § 1821. -- U.S.-- , 111 S.Ct. 599, 112 L.Ed.2d 608 (1991). In *Demarest* the Court said, "We do not believe that this is one of those rare cases where the application of the statute as written will produce a result 'demonstrable at odds with the intentions of its drafters.'" *Id.* 111 S.Ct. at 604. We agree that, on its face, the language of 12 U.S.C. § 1819(b)(2)(B)

V. Southern Ry., 93 F.2d 377, 379 (5th Cir.1937). The older approach to removal jurisdiction viewed removal as an appeal because the proceeding did not commence in federal court. *See, e.g., Barrow v. Hunton*, 99 U.S. 80, 25 L.Ed. 407 (1879). Under the modern understanding, removing this case does not constitute the appeal of a state court judgment to federal court.

allows removal at the procedural posture in which this case comes to us.[7] The statute states that the FDIC may "remove any such action, suit, or proceeding from a state court to the appropriate United States district court" (emphasis supplied). The statute's plain language is quite plain: Any action in a state court may be removed. This language does not limit removable actions to those that have not yet reached a state trial court judgment, nor does it limit removable actions to those that come to the federal courts from a specific state court (i.e., from state trial, as opposed to appellate, court). Furthermore, the contrast between the broad "a state court" and the specific "United States district court" within the same sentence strongly suggests that the drafters intended the meaning urged by the FDIC.

Like the Eleventh Circuit, which considered this issue under § 1819(b)'s predecessor statute, we can "discern no reason to confine the interpretation of 'action (from a state court)' to actions that have not reached judgment." *In re Savers Federal Savings & Loan Assoc.*, 872 F.2d 963, 966 (11th Cir. 1989). In *In re Savers* a debtor sued a financial institution in state court claiming as here, breach of contract and fraud and the institution counter claimed to recover on the debtor's note. After judgment and after denial of post-trial motions for hearing, new trial, and remittitur, the FSLIC was

---

[7] The FDIC contends that the language of 12 U.S.C. § 1821(d)(18)(B) establishes its right to remove appellate proceedings. This subsection states "In the event of any appealable judgment, the Corporation as conservator or receiver shall have all the rights and remedies available to the insured depository ... and the Corporation in its corporate capacity, including removal to Federal court and all appellate rights." Although we agree that this case is removable, we cannot accept this argument. While § 1821 makes it clear that the FDIC may remove a suit after judgment, it does not clearly establish that the FDIC may remove a case which is on appeal.

appointed conservator of the institution. It then filed notice of removal. The district court remanded concluding that the case was completed in state court and that defendant was, in effect, seeking appeal. The Eleventh Circuit granted mandamus and vacated the remand on the basis of § 1819 (b)(2)(B).

The Eleventh Circuit framed the question as "whether after there has been a final judgment by the state trial court, but when the period for appeal has not yet lapsed, a case ceased to be an 'action from a state court.'" 872 F.2d at 965-66. The court concluded that it did not and stated: "Had Congress intended to limit the removal power of FSLIC to suits pending before a state trial court, it could have explicitly state as much, as it did in ... 12 U.S.C. §632 ..." *Id.* at 966.

In the instant case, it is true, removal is sought from the state appellate court whereas in *Savers* no appeal had yet been filed. The significant factor, however, is that *state appellate proceedings had not yet been exhausted when removal was effected. Accord Murray v. Ford Motor Company*, 770 F.2d 461, 463 (5th Cir.1985) (per curiam); *Butner v. Neustadter*, 324 F.2d 783 (9th Cir.1963); *Munsey v. Testworth Laboratories, Inc.*, 227 F.2d 902, 903 (6th Cir.1955) (per curiam). In *FDIC v. Yancy Camp Development*, 889 F.2d 647, 648 (5th Cir.1989), a case which was on appeal, we allowed removal and the district court set aside a default judgment.

Therefore, unless Congress lacks the power under Article Three of the United States Constitution to confer federal jurisdiction upon federal district courts in cases such as this one, or unless Congress could not have intended to do so when it enacted FIRREA, the district court erred in remanding this action to the state court.

B. Article III Power to Create Jurisdiction in Federal District Courts.

While it is black letter law than "Congress may not expand the jurisdiction of the federal courts beyond the bounds established by the Constitution," *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491, 103 S.Ct. 1962, 1970, 76 L.Ed.2d 81 (1983), the power of Congress to authorize removal of cases on appeal has been repeatedly affirmed. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 349, 4 L.Ed. 97 (1816) ("Congress...may authorize removal either before or after judgment."); *Gaines v. Fuentes*, 92 U.S. 10, 18, 23 L.Ed. 524 (1876); and *Tennessee v. Davis*, 100 U.S. 257, 269, 25 L.Ed. 648 (1880). Congress, however, has seldom chosen to exercise this power,[8] and we must decide whether it has done so by enacting the FDIC removal statute.

C. The FDIC Removal Statute.

1. History

Special considerations arise because § 1819 is a jurisdictional statute. Jurisdictional statutes must be interpreted with an eye towards history.[9] The opponents

---

[8]Congress enacted at least one statute authorizing post-judgment removal during the Reconstruction era. *See* the Habeas Corpus Act of 1863, ch. 81 § 5, 12 Stat. 755, 757 ("And it shall be lawful in any such action or prosecution ... after final judgment, for either party to remove and transfer, by appeal, such case.")

[9]Justice Frankfurter in *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 360-379, 79 S.Ct. 468, 473-84, 3 L.Ed.2d 368 (1959) explained:

> (a)bstractly stated, the problem is the ordinary task of a court to apply the words of a statute according to their proper construction. But 'proper construction' is not satisfied by taking the words as if they were self-contained phrases. So considered, the words do not yield the meaning of the statute.

would have us believe that adopting the FDIC's view of § 1819 thoughtlessly and improvidently pushes "arising under" jurisdiction into a brave new world of expanded and uncontrollable growth, with no historical basis for this broadened approach. A review of the history of federal jurisdiction reveals that this statute does not carve out a new type of arising under jurisdiction never before seen. Rather, FIRREA returns us to an older version of arising under jurisdiction that existed until the early part of this century.

In *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat) 738, 822, 6 L.Ed. 204 (1824) Justice Marshall expounded on the outer limits of Article Three jurisdiction: "when a question to which the judicial power of the Union is extended by the constitution forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause." *Osborn* "reflects a broad conception of 'arising under' jurisdiction, according to which Congress may confer on the federal courts jurisdiction over any case or controversy that may call for the application of federal law." *Verlinden*, 461 U.S. at 492, 108 S.Ct. at 1970. Even if the only issues to be decided are ones of state law, Article Three permits the exercise of jurisdiction if one of the parties is a federal corporation. *See, e.g., The Bank of the United States v. The Planters' Bank of Georgia*, 22 U.S. (9 Wheat) 904, 6 L.Ed. 244 (1824).

> The words we have to construe are not only words with a history. They express an enactment that is part of a serial, and a serial that must be related to Article III of the Constitution, the watershed of all judiciary legislation, and to the enactments which have derived from that Article. If the history of the interpretation of judiciary legislation teaches anything, it teaches the duty to reject treating such statutes as a wooden set of self-sufficient words... (We must not forget that it) is a statute, not a Constitution, we are expounding.

Congress, however, did not actually grant the lower federal courts removal jurisdiction over federal question cases until 1875.[10] This statute, the predecessor to 28 U.S.C. § 1441, was given an expansive interpretation in the *Pacific Railroad Removal Cases*, 115 U.S. 1, 5 S.Ct. 1113, 29 L.Ed. 319 (1885). The *Pacific Railroad* Court relied on *Osborn* to hold that "every case, irrespective of its nature, brought by or against a federally charted corporation is a suit arising under the 'laws of the United States.'" Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 Cornell L.Q. 499, 509 (1928).

The expansive reading given by the *Pacific Railroad* Court to "arising under" was soon curtailed. *Id. See also Romero*, 358 U.S. at 379 n. 50, 79 S.Ct. at 484 n. 50, 28 U.S.C. § 1331, for example, is interpreted more narrowly than the Constitution permits. *Verlinden*, 461 U.S. at 494-95, 103 S.Ct. at 1971-72. The general removal statute, 28 U.S.C. § 1441, is also not interpreted as broadly as it could be. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108, 61 S.Ct. 868, 872, 85 L.Ed. 1214 (1941) (the "policy of the successive acts of Congress regulating the jurisdiction of the federal courts is one calling for the strict construction of (removal)") and *Willy v. Coastal Corp.*, 855 F.2d 1160 (5th Cir.1988), appeal after remand, 915 F.2d 965 (5th Cir.1990), aff'd -- U.S.--, 112 S.Ct. 1076, 117 L.Ed.2d 280 (1992). *See also* Collins, *The Unhappy History of Federal Question Removal*, 71 Iowa L.Rev. 717 (1986).

It is clear that no federal jurisdiction exists over the present dispute under either 28 U.S.C. § 1331 or § 1441 because the issues are governed by state law and federal law is a small ingredient of the dispute. *See Gully v First National Bank at Meridian*, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70

---

[10]Act of March 3, 1875, ch. 187, §2, 18 Stat. 470.

(1936) (for a suit to "arise under" federal law, a "right of immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action") and *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983). It is equally clear that Congress enacted 12 U.S.C. § 1819 precisely so that the FDIC could enjoy federal question jurisdiction similar to that articulated in Osborn and the Pacific Railroad Removal Cases. *See Pernie Bailey Drilling Co. v. FDIC*, 905 F.2d 78 (5th Cir. 1990); *Franklin National Securities Litigation v. Andersen*, 532 F.2d 842 (2nd Cir.1976); and *FDIC v. George-Howard*, 153 F.2d 591 (10th Cir.), *cert. denied*, 329 U.S. 719, 67 S.Ct. 53, 91 L.Ed. 623 (1946).

Thus, nothing in the history of federal jurisdiction compels us to ignore the plain meaning of § 1819 and find that it creates a more restricted type of removal jurisdiction than its language allows. Similarly, a broader look at the ways in which the statute enhances the FDIC's procedural, and in particular post-judgment powers reveals nothing inconsistent with our finding that it authorizes removal in this case.

2. Other Procedural Advantages in FIRREA.

We recently recognized an important way FIRREA increases the FDIC's post-judgment powers in *RTC v. McCrory*, 951 F.2d 68, 71 (5th Cir.1992). In that case, we held that FIRREA permitted federal regulators to assert their special defenses for the first time on appeal. *See also Union Federal Bank v. Minyard*, 919 F.2d 335, 336 (5th Cir.1990) (FDIC allowed to raise special defense for first time on appeal because, as the Corporation was not a party in the trial court, it had neither the occasion nor opportunity to raise it below);

FDIC v. Castle, 781 F.2d 1101, 1106 (5th Cir. 1986) (FDIC allowed to first raise defenses on appeal because applicability of defenses clear under relevant statute). Generally arguments not asserted until an action reaches an appellate level are lost. *See, e.g., Hulsey v. State of Texas*, 929 F.2d 168, 170 (5th Cir.1991), and cases cited therein. FIRREA confers a powerful litigation weapon by making such usually untimely arguments available to the FDIC, *but see Baumann v. Savers Federal Savings & Loan Assoc.*, 934 F.2d 1506, 1511 (11th Cir.1991), petition for cert. filed, (U.S. January 6, 1992) (holding that FIRREA does not allow Resolution Trust Corporation to raise issues on appeal which were not raised below.)

Furthermore, 12 U.S.C. §1819(b)(2)(C) allows the FDIC to appeal orders remanding removed actions to state courts. Under the general removal statutes, such orders are not appealable. 28 U.S.C. § 1447(d). In addition, the FDIC can remove in any case to which it is a party, even though generally only defendants can remove. 28 U.S.C. §1441(a). In *Lazuka v. FDIC*, 931 F.2d 1530, 1535 (11th Cir.1991), the Eleventh Circuit held that § 1819 allows the FDIC to overcome the "well-pleaded complaint" rule. Under this rule, the basis for federal jurisdiction must appear on the face of the complaint. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 2429, 96 L.Ed.2d 318 (1987). Section 1819 allows the FDIC to invoke federal jurisdiction regardless of what appears in the complaint. The Lazuka court found that, in enacting FIRREA, "Congress used very strong language to afford the FDIC every possibility of having a federal forum within the limits of Article III." *Id.*[11] Although this is not

---

[11]Additionally, it is even possible for parties other than the FDIC to remove an action once the FDIC becomes a party. *FDIC v. Otero*, 598 F.2d 627 (1st Cir.1979).

a post-judgment advantage, it is another indication of the importance Congress placed on getting cases falling under the scope of FIRREA into federal courts.

Cumulatively, these procedural advantages bestowed by Congress tremendously increase the FDIC's ability to carry out its regulatory and enforcement responsibilities under FIRREA. These advantages allow the FDIC to step into the shoes of a troubled financial institution at any stage of proceedings without being penalized for the timing of that substitution and to effectively and aggressively protect the institution's interests and assets. Our finding that § 1819 allows removal in this case is completely consistent with the other procedural advantages FIRREA gives the FDIC and with the underlying goal of promoting uniform federal, as opposed to state, regulation and supervision of thrift institutions.

D. Procedural Results of Allowing Appellate Removal.

Appellees argue against finding jurisdiction under FIRREA because of the procedural consequences. Their argument goes like this: If we allow removal after a final state court judgment has been entered and where Rule 60 relief is not available, the federal district court would have no original jurisdiction to exercise. Basically, it would face two choices. First, it could review the state court judgment in an appellate posture. We make no indication of the propriety of such action because it is not necessary to force district courts into this role when the other role available to them does not present such complex constitutional and jurisdictional issues.

This second option is for the district court to take the state judgment as it finds it, prepare the record as required for

appeal, and forward the case to a federal appellate court for review. We are not persuaded that this so-called "rubber-stamping" by district courts is so at odds with Article Three jurisprudence that it precludes following the plain language of the statute or that Congress could not have intended this result.

It is argued that district courts, in order to exercise original jurisdiction, must "judge something" in order for there to be a case or controversy before them under Article Three. The case or controversy requirement does not, however, preclude federal appellate courts from remanding cases to district courts on a regular basis with instructions to take a prescribed action, such as enter judgment for a specified party. *See, e.g., Mulligan v. Schultz*, 848 F.2d 655, 658 (5th Cir.1988) (district court's dismissal for lack of subject matter jurisdiction vacated and case remanded with instructions to enter judgment for appellees); *Ferguson v. Heckler*, 750 F.2d 503, 505 (5th Cir.1985) (district court's upholding of an ALJ's determination under Social Security Act reversed and case remanded with instructions to enter judgment in favor of the claimant); and *Thorne v. Jones*, 765 F.2d 1270, 1278 (5th Cir.1985), *cert. denied*, 475 U.S. 1016, 106 S.Ct. 1199, 89 L.Ed.2d 313 (1986) (district court's judgment against defendants for violating plaintiffs' constitutional rights reversed and case remanded with instructions to enter judgment for the defendants.). The district court's role in these remand situations is no less mechanical and involves no more active a judicial role than does adopting a state court judgment and sending the proceeding to an appellate court.[12]

---

[12] A compromise to the case or controversy issue would be to allow removal only when Fed.R.Civ.P. 60 relief is available. We are certain, however, that Congress did not intend to deprive the parties to

We have been presented with a parade of horribles which it is argued will follow from our holding. These premonitions unnecessarily complicate the matter. A case removed from state court simply comes into the federal system in the same condition in which it left the state system. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters, Etc.*, 415 U.S. 423, 435-36, 94 S.Ct. 1113, 1122-23, 39 L.Ed.2d 435 (1974). For instance, if the notice of appeal was adequate in the state court system, it should be deemed adequate when it enters the federal courts, regardless of whether the state technical requirements for notice of appeal differ from the federal. *Granny Goose*, 415 U.S. at 435-36, 94 S.Ct. at 1122-23 ("Judicial economy is promoted by providing that proceedings had in state court shall have force and effect in federal court, so that pleadings filed in state court, for example, need not be duplicated in federal court.").

Finally, we do not intend by the holding in this case to suggest that the FDIC removal statutes "effect a wholesale replacement" of the general removal statutes found in 28 U.S.C. §§ 1441-51. We agree that § 1819(b)(2)(B) invokes Section 1441 by referring to "the appropriate United States District Court" and that FIRREA's lack of provisions for the mechanics of removal necessitates reliance on the general schema. Indeed, we recently held that the FDIC must adhere to the timely filing requirements of the general removal statutes. *FDIC v. Loyd*, 955 F.2d 316 (5th Cir.1992) (28 U.S.C. § 1446(b) timely filing requirement applies to the FDIC under FIRREA). FIRREA, however, confers a specific removal power to a federal corporation. To the extent that the specific powers or mechanisms in the statute are inconsistent

---

this dispute of their right to appeal and to relegate them to relief under Rule 60 when it expanded the FDIC's removal power by enacting the FDIC removal statute.

with the general removal statutes, FIRREA supersedes the general statutes. This holding is consistent with the Eleventh Circuit's in *Lazuka v. FDIC*, which, like our decision in *Loyd*, held that removal under FIRREA does fit into the general removal scheme. 931 F.2d at 1536 (concluding that "the FIRREA removal provisions located at 12 U.S.C. § 1819 should be viewed as specific exceptions from the relevant provisions of general removal procedure, located at 28 U.S.C. §§ 1441, 1446, 1447" but reaching a different conclusion than *Loyd* concerning when the 80-day filing period under 28 U.S.C. § 1446 begins to run). Because the statutes and the law that has evolved from them conflict on the issue before us, FIRREA controls.

II. Sanctions

Since we reverse the district court's decision to remand the instant appeal, it is clear that its award of sanctions for improper removal must also be reversed.

Conclusions

The decision of the district court remanding this matter and assessing sanctions is REVERSED, its remand order is VACATED and this matter is REMANDED to the district court for further proceedings.

DeMoss, Circuit Judge, specially concurring:

During the pendency of this matter on appeal, 12 U.S.C. § 1819(b)(2)(B) was amended to read as follows:

"(B) Removal

Except as provided in subparagraph (D), the

> Corporation may, without bond or security, remove any action, writ or proceeding from a State court to the appropriate United States district court *before the end of the 90-day period beginning on the date the action, suit, or proceeding is filed against the Corporation or the Corporation is substituted as a party.*" (Underlining added to indicate new language)

(Pub.L. 102-242, Title I, § 161(d), 105 Stat. 2236, 2286, Dec. 19, 1991). Some of my colleagues think that this amendment has little or no significance. I think it does. The fundamental conflict in this case relates to the issue of whether the provisions of § 1819(b)(2)(B) indicate anything regarding Congress' intention about the status of the case being removed. Absent the new language added to this Section by the 1991 Amendment, I am inclined to agree with the dissent that the "general language does not address the trial/appellate status" of the case being removed.

With the new language of the 1991 Amendment in place, however, the "plain meaning" argument of the majority holds water, even in the unusual circumstances involved in this case. The new language indicates two periods of time when removal may be accomplished. The first period of time begins with the filing date of an action, suit, or proceeding in a state court in which "the Corporation" (FDIC) is a party defendant and ends 90-days later. The second period of time in which removal may be accomplished begins with the date the Corporation is substituted as a party in any action, suit, or proceeding in a state court and ends 90 days thereafter.

I recognize that the statutory language defining the second period does not contain express language like "regardless of the status of the case being removed." But the language defining the first period does clearly indicate that the Congress thought about the subject of status of the case being

removed (and the status of the Corporation as a party defendant therein) and the failure to use any language about the status of the case being removed (or the status of the Corporation as a party therein) in the definition of the second period should, in my mind, properly be construed as being a conscious omission; leading to the conclusion that whenever removal is sought in a case in which the Corporation has been substituted as a party, the status of the case being removed (and the status of the Corporation as a party) is not material.

The first period for removal reflects the traditional circumstances for removal as contemplated by 28 U.S.C. § 1441 et seq. but gives the Corporation 90 days instead of 30 days to effect removal. The second period for removal is a special and unique right granted to the Corporation as part of the broad remedial purposes of the FIRREA Legislation as described in the majority opinion. Likewise, for the reasons stated in the majority opinion, Congress clearly has the authority to establish this special and unique removal right. In the best of all worlds maybe Congress should have more thoroughly reflected its intentions with companion amendments which would expressly solve the uncertainties raised by the dissent. Obviously, we don't live in the best of all worlds. But I concur in the majority holding because I am satisfied that the language added by the 1991 Amendment does sufficiently express Congress' intent that removal be permitted even in the out-of-the-ordinary circumstances of this case.

POLITZ, Chief Judge, with whom GARWOOD, HIGGINBOTHAM, WIENER and EMILIO M. GARZA, Circuit Judges, join, dissenting:

I cannot accept the major disruption of federal practices and procedures and the gross intrusion on the state judicial systems fostered by the majority opinion and therefore respectfully dissent. Persuaded that the removal of this case

was inappropriate and improper, I would affirm the order of remand.

I briefly restate the procedural history and posture of these proceedings. Meyerland Co. and William M. Adkinson sued Continental Savings Association in state court in Texas for usury, fraud, fraud in the inducement, and misrepresentation. Continental counterclaimed for fraud and breach of contract. As damages, the trial court awarded Continental $30,031,089.99 and Adkinson $1,124,109.59. Meyerland and Adkinson appealed.

The parties had submitted their appellate briefs when, on September 30, 1988, the Federal Home Loan Bank Board declared Continental insolvent and appointed the Federal Savings and Loan Insurance Corporation as receiver. The FSLIC removed to federal district court but the case was remanded on April 21, 1989. On August 9, 1989, the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA), Pub.L. 101-73, 103 Stat. 183, was enacted and the FDIC succeeded the FSLIC as Continental's receiver. Claiming authority under FIRREA, 12 U.S.C. § 1819(b)(2)(B),[1] the FDIC removed the cause. Our district court again remanded and imposed $2500 in sanctions upon the FDIC. The FDIC timely appealed.[2]

FIRREA expands the original and removal jurisdiction

---

[1] FIRREA's jurisdictional provisions apply to cases pending on the date of its enactment. *See Triland Holdings & Co. v. Sunbelt Service Corp.*, 884 F.2d 205 (5th Cir.1989); *see also Kirkbride v. Continental Casualty Co.*, 933 F.2d 729 (9th Cir.1991); *Federal Deposit Ins. Corp. v. 232, Inc.*, 920 F.2d 815 (11th Cir.1991); *Demars v. First Service Bank for Savings*, 907 F.2d 1237 (1st Cir.1990); *In re Resolution Trust Corp.*, 888 F.2d 57 (8th Cir. 1989).

[2] Although remand orders generally are not appealable, 12 U.S.C. § 1819(b)(2)(C) authorizes appeal by the FDIC.

of the district courts by permitting the FDIC to remove cases which ordinarily would have been matters for the state courts. *See Carrollton-Farmers Branch Independent School District v. Johnson & Cravens,* 889 F.2d 571 (5th Cir.1989); *Triland Holdings & Co. v. Sunbelt Service Corp.*, 884 F.2d 205 (5th Cir.1989). The majority accepts the FDIC contention that FIRREA also allows the removal of a state court case even if the time for relief from judgment has run and the action is before a state appellate court. In cases in which Fed.R.Civ.P. 60 relief is not available, the disposition urged by the FDIC mandates one of two results: The federal district court, in reviewing the case on the merits, exercises appellate jurisdiction over the state court; or the district court must accept as its own the decision of the state court and immediately turn the case over to the appropriate federal court of appeals. I reject both alternatives and would conclude that if Rule 60 relief is either unavailable or not sought, FIRREA neither authorizes nor requires removal of a case from a state appellate court to a federal district court.

FIRREA, at 12 U.S.C. § 1819(b)(2), provides in pertinent part:

> (A) In general
> Except as provided in subparagraph (D), all suits of a civil nature at common law or in equity to which the Corporation, in any capacity, is a party shall be deemed to arise under the laws of the United States.
> (B) Removal.
> Except as provided in subparagraph (D), the Corporation may, without bond or security, remove any action, suit, or proceeding from a State court to the appropriate United States

district court.[3]

The FDIC insisted, and the majority now holds that the broad statutory language "any action, suit, or proceeding from a State court" permits removal regardless of the case's status within the state judicial system. Despite the breadth of the description of the categories of removable cases, however, the statute is silent on the critical question of the procedural posture of the litigation. I am convinced that the broad statutory language providing for removal of "any action, suit, or proceeding" describes and is limited to the types of removable matters; that general language does not address the trial/appellate *status*.

I am persuaded beyond peradventure that if Congress had intended to grant federal district courts the totally new power to review state court decisions, it would have articulated that authority with great specificity. An historical cornerstone of federal jurisdiction to federal district courts does not include the power to review final state court judgments.[4] It is therefore only reasonable to expect that if Congress intended to vest the removal authority as embraced by the majority that authority would have been expressed with the same preciseness found in other specific jurisdictional grants. For example, Congress has promulgated express, succinct guidelines for judicial review of agency actions. *See* the Administrative Procedure Act, at 5 U.S.C. §§ 701-706. In empowering the courts of appeals with authority to review particular agency orders, Congress has not required, as in the FIRREA removal provision, that the case be presented initially

---

[3] Subparagraph (D) is inapplicable to the present inquiry.

[4] *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923).

to the district court but has, instead, expressly permitted filing directly in the courts of appeals.[5] Similarly, the distinct boundaries of federal review of state court criminal procedures have been detailed expressly by Congress. *See* 28 U.S.C. §§ 2241-2254. One need be mindful that even the power of the United States Supreme Court to review final state court judgments has been legislatively defined. *See* 28 U.S.C. § 1257.

That section 1819's broad statutory language is not sufficient to create the exceptional removal right granted by the majority should immediately be apparent when one considers the consequences of that holding. Under today's holding we must either direct the district courts to sit as appellate courts over the removed state court cases, or require our trial courts to "rubber stamp" state court judgments and forward them to federal appellate courts for review. The first option requires the district court to exercise appellate jurisdiction, not original jurisdiction. *See* 28 U.S.C. § 1441(a). The language purportedly requiring this result is contained not only in section 1819, but also in the very statute that forges the original jurisdiction limitation. *Compare* 12 U.S.C. § 1819 (b)(2)(B) ("any action, suit, or proceeding

---

[5] 28 U.S.C. § 2342 (granting courts of appeals exclusive jurisdiction to review final orders of the Federal Communications Commission, the Secretary of Agriculture, the Secretary of Transportation, the Federal Maritime Commission, and the Interstate Commerce Commission); 8 U.S.C. § 1105a (Immigration and Naturalization Service order reviewed pursuant to 28 U.S.C. § 2341 *et seq.*); 29 U.S.C. § 160(f) (National Labor Relations Board orders reviewed by courts of appeals); and, 18 U.S.C. § 843(d)(2) (Secretary of Treasury licensing decisions reviewed by courts of appeals). *See also* 16 U.S.C. § 8251 (delineating the power of the United States Court of Appeals for the District of Columbia to review final orders of the Federal Power Commission) and 28 U.S.C. § 2645 (Court of International Trade decisions reviewed by the Federal Circuit).

from a state court") *with* 28 U.S.C. §1441(a) ("any civil action brought in a State court").

I see no conceivable support for the proposition that FIRREA effects a wholesale replacement of the usual federal schema, including the removal statues, 28 U.S.C. §§ 1441-1451.[6] For example, by referring to the "appropriate United States District Court," subsection 1819(b)(2)(B) obviously invokes the venue provisions of 28 U.S.C. 1441(a). FIRREA contains no provisions for the mechanics of removal. Without resort to the general statutes the procedures for notice of removal to the district court, for opposition thereto, and for stay of the state court proceedings are non-existent. At this point it is worthy of underscoring that when Congress took FDIC cases out of the ordinary rule forbidding appellate review of remand orders, it expressly detailed that exception in 12 U.S.C. § 1819(b)(2)(C). By contrast, FIRREA contains no waiver of the original jurisdiction limitation of district court jurisdiction or of any of the other general federal rules or procedures.

The majority finds the second FDIC suggestion acceptable: I do not. A district court forced to adopt a state trial court decision as its own would not be exercising original jurisdiction over a case or controversy. I reject the suggestion that Congress would consider, even momentarily, imposing such a limiting function on an Article III court.[7] Further,

---

[6] *See, e.g. Lazuka v. Federal Deposit Ins. Corp.*, 931 F.2d 1530, 1536 (11th Cir.1991) (Congress intended "that the FDIC adhere in most respects to general removal procedure"); *Federal Deposit Ins. Corp. v. Norwood*, 726 F.Supp. 1073, 1075 (S.D.Tex.1989).

[7] Congress' power to confer jurisdiction on federal courts under Article III of the United States Constitution is limited to "cases" and "controversies." In *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 69 S.Ct. 1173, 93 L.Ed. 1556 (1949),

assuming an adequate resolution of the district court's role, the incongruities inherent in this proposal extend even further for we are forced to theorize on the subject of our own jurisdiction. The FDIC suggests two procedural tracks for today's holding, one which requires a notice of appeal and one which does not.[8] Both of these alternatives are in conflict

---

however, three Supreme Court Justices took the view, rejected by the other Justices, that Article I of the Constitution empowers Congress to confer on "constitutional" federal courts powers beyond those defined in Article III. This theory has never been sanctioned by a majority of the Court and it is not viable today. *See* L. Tribe, American Constitutional Law, 68, 189-88 (1988) (footnote omitted); C.Wright, The Law of Federal Courts 110 (1983).

Reserving comment on its validity, we also distinguish the theory popularly known as "protective jurisdiction." This theory has been posited to justify congressional grants of federal subject matter jurisdiction without concomitant substantive legislation, but not to justify grants of jurisdiction without the power to judge the case. *See* Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 Harv.L.Rev. 1, 21 (1957); C.Wright, *supra.* at 110-11.

In addition "in order for a claim to be justiciable as an Article III matter, it must 'present a real and substantial controversy which unequivocally calls for adjudication of the rights' asserted." L. Tribe. *supra.* at 68 (quoting *Poe v. Ullman*, 367 U.S. 497, 509, 81 S.Ct. 1752, 1759, 6 L.Ed.2d 989 (1961) (Brennan, J., concurring in the judgment)). The "justiciability" maxim is anchored in concepts of "mootness," "ripeness," and "standing," and does not precisely address the "rubber stamp" theory before this court. *See e.g., Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). Nonetheless, just as it requires an adversarial context, the case-or-controversy requisite of Article III would seem to require, at a minimum, the power to judge something.

[8] One proposed procedural track that this court could adopt to effectuate the FDIC's interpretation would not require a federal notice of appeal. The FDIC suggests:

with other well-established rules. One rubric provides that once a case has been removed to federal court its course is governed by federal law. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers*, 415 U.s. 423, 441, 94 S.Ct. 1113, 1125, 39 L.Ed. 2d 435, 451 (1974). The majority embraces *Granny Goose Foods*. Another rule obliges the federal court to accept the case "in its current posture 'as though everything done in state court had in fact been done in the federal court.'" *Nissho-Iwai American Corp. v. Kline*, 845 F.2d 1300, 1303 (5th Cir.1988) (quoting *Savell v. Southern Ry.*, 93 F.2d 377, 379 (5th Cir.1937) and discussing *Granny Goose Foods*). If a case is already on appeal in state court and is subsequently removed to a federal district court, however, we must either ignore the federal notice of appeal requirements in order to accept the case in its state posture, or we must ignore the state posture by requiring

---

Under this approach, an appeal perfected in state court results in the perfection of an appeal in the federal circuit court. Because a notice of appeal has already been filed in state court and is, upon removal on file in the federal district court, no new notice would need to be filed in the federal court. The state court notice of appeal would be given the same effect as if it were a notice of appeal filed in federal court. The federal district court need only transmit the record to the federal court of appeals so that the case can proceed from the point where it left off in state appellate court.

The FDIC also proffers an alternative proposal, the procedure followed by the Eleventh Circuit in *Jackson v. American Sav. Mortg. Corp.*, 924 F.2d 195 (11th Cir.1991). Under the *Jackson* procedure, the FDIC must file a Rule 59 motion. If the district court refuses to modify or vacate, then the state court judgment or order becomes the district court's judgment or order. A notice of appeal would follow the district court's disposition of the Rule 59 motion.

a federal notice of appeal. With today's holding, without any congressional leave the *jurisdictional* notice of appeal simply disappears. By a deft brush of legal legerdemain the majority automatically vests federal appellate jurisdiction over a state court case which has, somehow, passed through the precincts of a powerless district court judge. Appellate jurisdiction is just one example of the attendant clashes between state an federal procedures. If, "any action, suit, or proceeding" means *any matter* at *any stage* in the litigation process, then a case may be removed while a writ of certiorari is pending before the state's highest court or, even more startling, after disposition by the state's highest court and pending a petition for rehearing before that court, or even thereafter pending a writ application to the United States Supreme Court. In each of those instances we must now fabricate the appropriate procedural rules out of whole cloth. Are we to decide whether the state court would consider the case important enough to grant discretionary review? Should we apply our own appellate rules and consider the appeal mandatory? Should we grant the rehearing? What standard are we to apply in reviewing the rehearing; should we seek to act as we fathom the state court would act or should we independently analyze the problem? Extending the majority's analysis perhaps we should mandate the adoption of the state appellate court's decision as our own decision and then allow the case to proceed on a writ of certiorari from this court to the United States Supreme Court. Or even more alarming, suppose the supreme court of the state has granted a writ of certiorari to an intermediate state appellate court at the time of the FIRREA removal. Does that require the United States Supreme Court to hear the case on certiorari? Under the majority's analysis of *Granny Goose Foods* that answer apparently must be "yes." Other questions come to mind. I entertain no doubt whatever that the simple broad language of 12 U.S.C. § 1819(b)(2)(B) was not intended to impose those

bizarre procedures upon the federal judiciary, either trial or appellate.

These dizzying circumstances would not plague our federal procedural scheme, however, if after removal the district court were asked to grant Rule 60(b) relief. In that setting the long established federal protocols would not be shredded. In prior decisions we have allowed the removal of a case subsequent to a state court default judgment where Rule 60(b) relief was still available. *Federal Deposit Ins. Corp. v. Yancey Camp Development Co.*, 889 F.2d 647 (5th Cir.1989), is the only prior case allowing removal after the state appellate court has been vested with jurisdiction. In *Yancey* we held that the district court improperly refused to set aside a state default judgment. We did not discuss the removal question but noted that a "state court judgment in a case properly removed to federal court--like the one before us--can be vacated under Federal Rule of Civil Procedure 60(b)." 889 F.2d at 648.

In *Murray v. Ford Motor Co.*, 770 F.2d 461 (5th Cir.1985), removal was effected while a timely motion to set aside a default judgment was pending in the state trial court. The state court had not received the removal notice and had entered a default judgment after the removing party failed to appear in court. Pursuant to Rule 60(b)(1) we allowed the state judgment to be set aside. Similarly, in *Beighley v. Federal Deposit Ins. Corp.*, 868 F.2d 776 (5th Cir.1989), motions to vacate the judgment and for a new trial were still pending in the state trial court when the suit was removed.

In *Northshore Development, Inc. v. Lee*, 835 F.2d 580 (5th Cir.1988), we interpreted 12 U.S.C. § 1730 (k)(1) (repealed) to permit removal after entry of a state trial court damages award; the FSLIC was seeking Rule 60(b) relief. We have also permitted a district court on removal to set aside a default judgment against a Jones Act defendant. *Azzopardi*

v. Ocean Drilling & Exploraiton Co., 742 F.2d 890 (5th Cir. 1984). The Ninth Circuit has permitted a district court on removal to set aside a default judgment against a diverse defendant on a state law claim. *Butner v. Neustadter*, 324 F.2d 783 (9th Cir.1963). In *Munsey v. Testworth Laboratories, Inc.*, 227 F.2d 902 (6th Cir.1955), the Sixth Circuit did likewise. Removal in these cases did not require or result in a disruption of the established federal procedural practices.

I cannot accept the contention that congressional policy behind FIRREA justifies the remarkable removal power which today's majority grants the FDIC. Indeed, the scant guidance provided by FIRREA's legislative history supports my conclusion that the words "any" and "State court," when interpreted in the context of FIRREA and the general procedural statutes, do not mean *every* matter at *every* procedural stage of litigation. When FIRREA's removal provision was first submitted in a House of Representatives amendment it was described as vesting in the FDIC only the "authority to remove certain State court proceedings to Federal court." H.R.Rep. No. 101-54(I), 101st Cong. 1st Sess., *reprinted in* 1989 U.S.Code Cong. Admin.News 86, 124-25 (discussing H.R. 1278, 101st Cong., 1st Ses. (Version 2 of May 18, 1989)) (emphasis added). *Certain* proceedings, not *all* state court proceedings.

I would hold that 12 U.S.C. § 1819(b)(2) does not permit the FDIC to remove a state court appellate proceeding if, at the time of removal, relief is not available under Rule 60 of the Federal Rules of Civil Procedure, and therefore respectfully DISSENT.

(APPENDIX B)

Trial Court Judgment

MEYERLAND COMPANY and WILLIAM M. ADKINSON
v.
CONTINENTAL SAVINGS ASSOCIATION
In the District Court of Harris County, TEXAS
269th Judicial District
No. 86-36700
May 26, 1987

JUDGMENT

BE IT REMEMBERED that on the 23rd day of March, 1989, the above-captioned cause came on to be heard for trial with all parties having agreed to such trial setting and to the assignment of this cause to this Court for trial. All parties appeared either in person or by and through their counsel of record and announced ready for trial. After hearing various preliminary matters, the Court empaneled a Jury of twelve without objection by any party.

The Court and Jury thereupon heard the evidence and argument of counsel through April 29, 1987, on which date Plaintiffs Meyerland Company and William M. Adkinson rested their case-in-chief. Defendant Continental Savings Association thereupon moved for a directed verdict,

which motion was granted in part and denied in part.

The trial then continued with the presentation of the Defendant's case-in-chief until May 6, 1989, on which date the Defendant rested. Plaintiffs then moved for a directed verdict, which motion was in all things denied. The trial continued with the presentation of the Plaintiffs' rebuttal case on May 6, 1989, at the conclusion of which all parties rested.

The trial then stood in recess while the Court prepared its Charge to the Jury. On May 11, 1987, after hearing the objections of all parties to the Charge, the Court charged the Jury and permitted the parties to present their summations of the evidence. The Jury then retired to deliberate until May 13, 1987, on which date the Jury returned its Verdict in open court. No objections were made to the Verdict and all parties moved the Court to receive and file the Verdict, which motions were granted.

The verdict of the Jury in answer to the special Issues presented to it (omitting instructions, definitions and such Issues as were not answered on the Court's instructions predicating certain Issues on previous answers) were as follows:

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that First Western Equity, Inc. was an agent for Meyerland Company in connection with the purchase of the Loan Participations?

ANSWER: Yes

SPECIAL ISSUE NO. 2

Do you find from a preponderance of the evidence

that, prior to February 3, 1986, Continental Savings knew that First Western Equity, Inc. was acting as an agent, if it was, for Meyerland Company in connection with the purchase of the Loan Participations?

ANSWER: No

SPECIAL ISSUE NO. 3

Do you find from a preponderance of the evidence that Meyerland Company or First Western Equity, Inc. knew that Continental Savings would not have made the Loan in Question had Continental known that First Western Equity, Inc. was acting as agent for Meyerland Company in connection with the purchase of the Loan Participations?

ANSWER: No

SPECIAL ISSUE NO. 4

Do you find from a preponderance of the evidence that the money for the purchase prices of the Loan Participations came from the proceeds of the Loan in Question?

Loan		Answer
1.	Riddle/Crows Nest, Inc. - Crows Nest	Yes
2.	The Park, A Texas Joint Venture - The Park	Yes
3.	Robert R. Burchfield, Trustee - Crown Park Plaza I	Yes

4.	Robert R. Burchfield, Trustee - Crown Park Plaza II	Yes

SPECIAL ISSUE NO. 5

Do you find from a preponderance of the evidence that the money for the down payment for the purchase of the R.E.O. came from the proceeds of the Loan in Question?

Tract		Answer
1.	Fayette County Property	Yes
2.	Casselwood Apartments	Yes
3.	Flagridge Property	Yes
4.	Continental Savings Building	Yes

SPECIAL ISSUE NO. 6

Do you find from a preponderance of the evidence that Continental Savings used the Meyerland Company $1 Million savings account to pay to itself interest on loans in which Harry Terry was involved?

ANSWER: Yes

SPECIAL ISSUE NO. 7

Do you find from a preponderance of the evidence that, in connection with their business dealings leading up to the Loan in Question, the purchase of the Loan Participations and the R.E.O. and the Terry Transaction,

from the Fall of 1985 through February of 1986, Continental Savings entered into a confidential relationship with Meyerland Company or Mr. Adkinson or both?

ANSWER as to Meyerland Company: No
ANSWER as to Mr. Adkinson: No

SPECIAL ISSUE NO. 12

Do you find from a preponderance of the evidence that Continental Savings, as a condition to the funding of the Loan in Question, required Meyerland Company to use $8,355,000 to pay for the purchase of the Loan Participations?

ANSWER: No

SPECIAL ISSUE NO. 13

Do you find from a preponderance of the evidence that Continental Savings, as a condition to the funding of the Loan in Question, required Meyerland Company to use $1,742,961.26 to pay the down payments for the purchase of the R.E.O.?

ANSWER: No

SPECIAL ISSUE NO. 14

Do you find from a preponderance of the evidence that Continental Savings, as a condition to the Loan in Question, required the purchase of the Loan Participations?

ANSWER: Yes

SPECIAL ISSUE NO. 15

Do you find from a preponderance of the evidence that Continental Savings, as a condition to the Loan in Question, required the purchase of the R.E.O.?

ANSWER: Yes

SPECIAL ISSUE NO. 16A

Do you find from a preponderance of the evidence that Meyerland Company had the purpose and contemplation that the Loan in Question involved a deceptive device?

ANSWER: Yes

SPECIAL ISSUE NO. 16B

Do you find from a preponderance of the evidence that Continental Savings did not have the purpose and contemplation that the Loan in Question involved a deceptive device?

ANSWER: No

SPECIAL ISSUE NO. 17

Do you find from a preponderance of the evidence that Meyerland Company is estopped to claim that the Loan in Question is usurious?

ANSWER: No

SPECIAL ISSUE NO. 18

Do you find from a preponderance of the evidence that Meyerland Company waived its right to claim that the Loan in Question is usurious?

ANSWER: Yes

SPECIAL ISSUE NO. 19

Do you find from a preponderance of the evidence that Continental Savings defrauded Meyerland Company or Mr. Adkinson or both by making false representations regarding the value or effect of the Loan Participations, the R.E.O. or the Terry Transaction?

ANSWER as to Meyerland Company: No
ANSWER as to Mr. Adkinson: Yes

SPECIAL ISSUE NO. 20

What sum of money, if any, do you find from a preponderance of the evidence would fairly and reasonably compensate Meyerland Company or Mr. Adkinson for its actual damages, if any, proximately caused by the fraud, if any, committed by Continental Savings?

ANSWER as to Mr. Adkinson: $1,000,000.00

SPECIAL ISSUE NO. 23

Do you find from a preponderance of the evidence that the representations in the Opinion Letters were intended by Meyerland Company or Mr. Adkinson or both to be relied upon by Continental Savings?

ANSWER as to Meyerland Company: Yes

ANSWER as to Mr. Adkinson: Yes

SPECIAL ISSUE NO. 24

Do you find from a preponderance of the evidence that Continental Savings relied upon such representations in making the Loan in Question?

ANSWER: Yes

SPECIAL ISSUE NO. 25

Do you find from a preponderance of the evidence that Robert Collins, acting as attorney for Meyerland Company and Mr. Adkinson in connection with the Loan in Question, knew or should have known whether the Loan in Question was or was not usurious?

ANSWER: Yes

SPECIAL ISSUE NO. 26

Do you find from a preponderance of the evidence that in order to secure a loan from Continental Savings, Meyerland Company or Mr. Adkinson knowingly misrepresented any of the following facts, intending them to be relied upon by Continental savings and which were in turn relied upon by Continental Savings to the detriment of Continental Savings?

a. That Meyerland Company and Mr. Adkinson were financially secure?

ANSWER as to Meyerland Company: No
ANSWER as to Mr. Adkinson: No

b. That the financial statements delivered to Continental Savings were true and correct in all material respects and prepared in accordance with generally accepted accounting principles consistently applied?

ANSWER as to Meyerland Company: No
ANSWER as to Mr. Adkinson: No

c. That the financial statements delivered to Continental Savings fully and accurately presented the financial condition of Meyerland Company as of the dates thereof and no material adverse change has occurred in the financial condition reflected in the financial statements prior to the closing of the transaction?

ANSWER as to Meyerland Company: No
ANSWER as to Mr. Adkinson: No

d. That Meyerland Company would expend all proceeds for the purposes specified in securing the loan and for no other purpose?

ANSWER: No

e. That Meyerland Company would make all payments due on the Loan in Question?

ANSWER: No

f. That First Western Equity, Inc. was purchasing the Loan Participations for its own (that is, First Western Equity's) account?

ANSWER: No

SPECIAL ISSUE NO. 29

Do you find from a preponderance of the evidence that Meyerland Company or Mr. Adkinson delayed for an unreasonable length of time before asserting their claims in this case and that Continental Savings was disadvantaged by such delay?

ANSWER as to Meyerland Company: No
ANSWER as to Mr. Adkinson: No

All parties moved the Court to enter a Judgment upon certain various terms.

Pursuant to the stipulation of all parties, all questions of fact and law regarding Defendant's prayer for attorneys' fees were submitted to the Court. The Court, after hearing evidence on such matters, hereby finds and concludes that Defendant Continental Savings Association is entitled to recover attorneys' fees as follows:

- $230, 423.50 as attorneys' fees for services rendered at the District Court level;
- $75,000.00 as attorneys' fees in the event of an appeal here.
- $15,000.00 as attorneys' fees in the event an application for writ of error to the Texas Supreme Court is filed in connection with this cause; and
- $10,000.00 as attorneys' fees in the event an application for writ of error is granted by the Texas Supreme Court in connection with this cause.

Based upon the verdict of the Jury and such findings of fact and conclusions of law as the Court is entitled to make, the Court finds as follows: that Defendant/Counterplaintiff Continental Savings Association is entitled to recover the sum of $30,031,089.99 from Counterdefendants Meyerland Company and William Michael Adkinson, jointly and severally; that Plaintiff William Michael Adkinson is entitled to an offset against such award in the amount of $1,124,109.50; that under the circumstances said offset should apply to reduce the indebtedness owed by Plaintiff Meyerland Company also; and that the total judgment should include the first award of attorneys' fees found above.

The Court does not grant the motions for judgment of any party *in toto* but hereby grants the same to the extent reflected in this Judgment but otherwise denies the same. It is accordingly

ORDERED, ADJUDGED and DECREED that Defendant Continental Savings Association as Counterplaintiff have and recover, and there is hereby awarded to it, the total sum of TWENTY-NINE MILLION ONE HUNDRED THIRTY SEVEN THOUSAND FOUR HUNDRED THREE AND 99/100 DOLLARS ($29,137,403.99) against Plaintiffs/Counterdefendants Meyerland Company and William M. Adkinson, jointly and severally. This award shall bear post-Judgment interest at a rate of 18%/annum. It is further

ORDERED, ADJUDGED and DECREED that Defendant/Counterplaintiff Continental Savings Association have judgment and recover from Meyerland Company or William Michael Adkinson or both the sum of $75,000.00 in the event that it, he or they file an appeal bond for costs herein or otherwise perfect and appeal from this Judgment. It is further

ORDERED, ADJUDGED and DECREED that Defendant/Counterplaintiff Continental Savings Association have judgment and recover from Meyerland Company or William Michael Adkinson or both the sum of $15,000.00 in the event that any party files an application for writ of error to the Texas Supreme Court. It is further

ORDERED, ADJUDGED and DECREED that Defendant/Counterplaintiff Continental Savings Association have judgment and recover from Meyerland Company or William Michael Adkinson or both the sum of $10,000.00 in the event the Texas Supreme Court grants an application for writ of error in connection with this cause. It is further

ORDERED, ADJUDGED and DECREED that all right, title and interest of Meyerland Company, of William M. Adkinson and of both in and to and derivative of that certain promissory note in the face amount of $1,000,000.00 made by Harry B. Terry in February of 1986 to William M. Adkinson as payee be and they are hereby awarded to Continental Savings Association. It is further

ORDERED, ADJUDGED and DECREED that Continental Savings Association have and recover all cash deposits in lieu of bond previously made with the District Clerk of Harris County in connection with the granting of any temporary restraining order or temporary injunction in connection with this cause, including but not limited to those deposits made on or about January 18, 1987, and on or about April 7, 1987. It is further

ORDERED, ADJUDGED and DECREED that all costs of Court incurred herein be and they are hereby taxed against Plaintiffs Meyerland Company and William M. Adkinson, jointly and severally. It is further

ORDERED, ADJUDGED and DECREED that each and every order granting temporary equitable relief, whether styled as a temporary restraining order, a

temporary injunction or otherwise, be an they are hereby DISSOLVED.

All relief not expressly granted herein is hereby DENIED.

SIGNED this 26th day of May, 1987.

The Honorable David West

Judge Presiding

(APPENDIX C)

Order of Remand

Meyerland Company and William M. Adkinson,
Appellants,
v.
Continental Savings Association,
Appellee.

United States District Court
for the Southern District of Texas
Houston Division
Civil Action No. H-88-3783
April 23, 1989

ORDER OF REMAND

It appearing that Appellants' Amended Motion for Remand is well taken, it is, accordingly,

ORDERED, ADJUDGED AND DECREED that the Amended Motion to Remand is granted, and that Civil Action No. H-88-3783, Meyerland Company, et al vs. Continental Savings Association be, and hereby is, ordered remanded to the Court of Appeals for the First Supreme Judicial District of the State of Texas, sitting in Houston,

Texas.

SIGNED the 21st day of April, 1989.

/s/

Hon. Kenneth Hoyt
Judge Presiding

(APPENDIX D)

Order Remanding Case

Meyerland Company and William M. Adkinson,
Appellants,
v.
Continental Savings Association,
Appellee,

Federal Deposit Insurance Corporation
as Manager of the FSLIC Resolution Fund
as Receiver for Continental Savings Association,
Intervenor/Receiver.

In the United States District Court
for the Southern District of Texas
Houston Division
Civil Action No. H-89-3015
September 29, 1989

ORDER REMANDING CASE

ORDERED that this cause of action is remanded to the Court of Appeals for the First Supreme Judicial District of the State of Texas, at Houston, Texas.

This case was previously removed to this Court and was remanded on April 21, 1989. No good purpose is served by this second removal and the Court concludes that the removal is violative of the purpose and spirit of 28

U.S.C. 1447(c) and Rule 11 of the Federal Rules of Civil Procedure.

Appellants are awarded $2,500 as their costs, to be paid by Federal Deposit Insurance Corporation and its counsel Lee Larkin.

SIGNED this 27th day of September, 1989.

/s/

Kenneth M. Hoyt
United States District Judge

(APPENDIX E)

Order for Stay Pending Reconsideration

Meyerland Company and William M. Adkinson,
Appellants,
v.
Continental Savings Association,
Appellee

Federal Deposit Insurance Corporation
as Manager of the FSLIC Resolution Fund
as Receiver for Continental Savings Association,
Intervenor/Receiver.

In the United States District Court
for the Southern District of Texas
Houston Division
Civil Action No. H-89-3015
October 12, 1989

ORDER FOR STAY PENDING RECONSIDERATION

Came on for consideration the Motion of the Federal Deposit Insurance Corporation as Manager of the FSLIC Resolution Fund as Receiver for Continental Savings Association for Reconsideration of Remand Order and Sanctions and to Stay Order of Remand and Sanctions Pending Reconsideration and the Court, having considered the motion, brief, and argument of counsel, is of the

opinion that it is without jurisdiction because the case was remanded on October 4, 1989.

It is therefore ORDERED that the Order for Stay Pending Reconsideration is DENIED.

SIGNED this 11th day of October, 1989.

/s/

Kenneth M. Hoyt
United States District
Judge

(APPENDIX F)

Order Denying Appeal

Meyerland Company and William M. Adkinson,
Appellants,

v.

Continental Savings Association,
Appellee

Federal Deposit Insurance Corporation
as Manager of the FSLIC Resolution Fund
as Receiver for Continental Savings Association,
Intervenor/Receiver.

In the United States District Court
for the Southern District of Texas
Houston Division
Civil Action No. H-89-3015
November 6, 1989

ORDER

The emergency motion for stay pending appeal has been filed by the FDIC as manager of the FSLIC Resolution Fund for the failed Continental Savings Association. Previously, this case was removed from the First Court of Appeals of Texas. It was remanded. Again, this case has been removed because of the enactment of the Financial Institutions Reform, Recovery and Enforcement Act of

1989.

It is the view of this Court that a final judgment has been entered against Continental Savings Association and that this Court has no authority to review the factual or legal circumstances attendant to that judgment. In this regard, there are no justiciable issues to be tried. Comity dictates that this Court take a "hands-off" approach.

Because there are no issues remaining between the parties, an appeal would be frivolous.

The FDIC's motion is DENIED.

SIGNED this 30th day of October, 1989.

/s/

Kenneth M. Hoyt
United States District
Judge

(APPENDIX G)

Panel Opinion

In the Matter of MEYERLAND CO.,
and William M. Adkinson, Debtors.

FEDERAL DEPOSIT INSURANCE CORP.,
as Manager of the FSLIC Resolution Fund
as Receiver for Continental Savings Association,
Appellant,
v.
Meyerland Co., and William Adkinson,
Appellees.

United States Court of Appeals, Fifth Circuit
No. 89-6118
September 7, 1990

Rehearing and Rehearing En Banc
Denied Oct. 5, 1990

Appeal from the United States District Court for the Southern District of Texas.

Before GARZA, HIGGINBOTHAM and DUHE', Circuit Judges.

DUHE', Circuit Judge:

Proceedings Below and Appellate Jurisdiction

Meyerland Co. and William M. Adkinson sued Continental Savings Association ("Continental") for, among other things, usury and fraud in state court. Continental counterclaimed for fraud and breach of contract. The trial court awarded Continental $30,031,089.99 and Adkinson $1,124,109.59 in damages. Meyerland and Adkinson appealed.

After the appeal was filed, the Federal Home Loan Bank Board declared Continental insolvent and appointed the Federal Savings and Loan Insurance Corporation (FSLIC) as receiver. The FSLIC removed to federal district court which remanded on April 21, 1989.

On August 9, 1989, the Financial Institutions Reform, Recovery and[1] Enforcement Act (FIRREA), Pub.L. 101-73, 103 Stat. 183 was enacted. The Federal Deposit Insurance Corporation (FDIC) succeeded the FSLIC as the receiver of Continental and the FDIC then removed this case on September 7, 1989 under § 209(4) of the FIRREA (12 U.S.C. § 1819(b)(2)(B)). The district court again remanded and awarded the appellees $2,500 in sanctions.

The FDIC appeals. Although remand orders are generally not appealable, 12 U.S.C. § 1819(b)(2)(C) authorizes an appeal in this case. This appeal presents two issues: (1) Whether 12 U.S.C. § 1819(b)(2) authorizes the

---

[1] Although the FIRREA was enacted after the current proceeding was initiated, it is clear that the FDIC may utilize it. *See Turboff v. Merrill Lynch, Pierce, Fenner, & Smith*, 867 F.2d 1518, 1521 (5th Cir.1989) (Jones, J.) ("When Congress adopts statutory changes while suit is pending the effect of which is not to eliminate a substantive right but rather to change the tribunal which will hear the case, those changes--barring specifically expressed intent to the contrary--which have immediate effect.") (citations omitted); and *In re Resolution Trust Co.*, 888 F.2d 57, 58 (8th Cir.1989).

FDIC to remove a state court appellate proceeding; and (2) Whether the district court erred in awarding sanctions.

(1) Whether Congress meant what it said.

12 U.S.C. § 1819(b)(2) states:
(A) In general
Except as provided in subparagraph (D), *all suits of a civil nature* at common law or in equity to which the Corporation, in any capacity, is a party shall be deemed to arise under the laws of the United States.
(B) Removal
Except as provided in subparagraph (D), the Corporation may...remove *any such action*, suit or proceeding from a state court to the appropriate United States district court. (emphasis supplied).
The exception in subparagraph (D) does not apply to the instant case and the sole issue to be decided, therefore, is whether Congress meant to authorize the FDIC to remove a state court appellate proceeding. To decide this issue, we must first determine (A) whether Article Three authorizes jurisdiction over this type of removal and, (B) if so, whether Congress meant to authorize appellate removal when it enacted § 1819(b)(2).[2]

---

[2]We do not decide whether this type of removal would be proper under 28 U.S.C. §1441. First, it is clear that the FDIC could not remove the instant case under §1441. The dispute hinges on state law and thus, there is no federal question jurisdiction. Second, it is unclear whether the FDIC may utilize § 1441 to effectuate removal in any case, not just the present one. In *FDIC v. Sumner Financial Corp.*, 602 F.2d 670 (5th Cir.1979) we held that the predecessor statute to 12 U.S.C. §1819(b)(2) was a complete jurisdictional scheme and that both original and removal jurisdiction over the FDIC was proper only if the case fell within the ambit of § 1819. *Id.* at 677-80. *See also FDIC v.*

(A) Article Three

It is black letter law that "Congress may not expand the jurisdiction of the federal courts beyond the bounds established by the Constitution." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491, 103 S.Ct. 1962, 1970, 76 L.Ed.2d 81 (1983). The power of Congress to authorize removal of cases on appeal has been repeatedly affirmed. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 349, 4 L.Ed. 97 (1816) ("Congress...may authorize removal either before or after judgment."); *Gaines v. Fuentes*, 92 U.S. 10, 18, 12 L.Ed. 524 (1876); and *Tennessee v. Davis*, 100 U.S. 257, 269 25 L.Ed. 648 (1880). Congress, however, has seldom chosen to exercise this power and we must decide whether it has done so by enacting the FDIC removal statute.[3]

(B) The FDIC Removal Statute

The FDIC argues that 12 U.S.C. § 1819(b)(2) means exactly what it says and since it does not exclude appellate

---

Elefant, 790 F.2d 661 (7th Cir.1986). It is not entirely clear, however, that *Sumner* is still good law. In *FSLIC v. Ticktin*, 490 U.S. 82, 109 S.Ct. 1626, 104 L.Ed.2d 73 (1989) the Supreme Court held that the statute granting jurisdiction over the FSLIC, 12 U.S.C. 1730(k)(1), was not exclusive and did not preclude the exercise of jurisdiction under other grants of jurisdiction. The FSLIC jurisdictional statute was very similar to the statutory predecessor to the FDIC jurisdictional statute and *Ticktin*, therefore, calls into question the result in *Sumner*.

[3] Congress enacted at least one statue authorizing post-judgment removal during the Reconstruction era. *See* the Habeas Corpus Act of 1863, ch. 81, §5, 12 Stat. 755, 757 ("And it shall be lawful in any such action or prosecution ... after final judgment, for either party to remove and transfer, by appeal, such case.")

removal, then it authorizes appellate removal. We would agree with the FDIC that the plain meaning of the statute controls its interpretation. *See Mills v. Director*, 877 F.2d 356, 362 (5th Cir.1989) (en banc) (Duhe', J., dissenting). Jurisdictional statutes, however, must also be interpreted with and eye towards history. Justice Frankfurter in *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 360-379, 79 S.Ct. 468, 473-484, 3 L.Ed.2d 368 (1959) explained:

> abstractly stated, the problem is the ordinary task of a court to apply the words of a statute according to their proper construction. But 'proper construction' is not satisfied by taking the words as if they were self-contained phrases. So considered, the words do not yield the meaning of the statute. The words we have to construe are not only words with a history. They express an enactment that is part of a serial, and a serial that must be related to Article III of the Constitution, the watershed of all judiciary legislation, and to the enactments which have derived from that Article.
>
> If the history of the interpretation of judiciary legislation teaches anything, it teaches the duty to reject treating such statutes as a wooden set of self-sufficient words . . . (We must not forget that it) is a statute, not a Constitution, we are expounding.

History tells us clearly what Congress meant when it enacted 12 U.S.C. § 1819(b)(2). In *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat) 738, 822, 6 L.Ed. 204

(1824) Justice Marshall expounded on the outer limits of Article Three jurisdiction: "when a question to which the judicial power of the Union is extended by the constitution forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause." *Osborn* "reflects a broad conception of 'arising under' jurisdiction, according to which Congress may confer on the federal courts jurisdiction over any case or controversy that may call for the application of federal law." *Verlinden*, 461 U.S. at 492, 103 S.Ct. at 1970. Even though the only issues to be decided are ones of state law, Article Three permits the exercise of jurisdiction if one of the parties is a federal corporation. *See, e.g., The Bank of the United States v. The Planters' Bank of Georgia*, 22 U.S. (9 Wheat) 904, 6 L.Ed. 244 (1824). Congress, however, did not actually grant the lower federal courts removal jurisdiction over federal question cases until 1875.[4] This statute, the predecessor to 28 U.S.C. § 1441, was given an expansive interpretation in the *Pacific Railroad Removal Cases*, 155 U.S. 1, 5 S.Ct. 1113, 29 L.Ed. 319 (1885). The *Pacific Railroad* Court relied on *Osborn* to hold that "every case irrespective of its nature, brought by or against a federally charted corporation is a suit arising under the 'laws of the United States.'" Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 Cornell L.Q. 499, 509 (1928). The expansive reading given by the *Pacific Railroad* Court to "arising under" was soon curtailed. *Id. See also Romero*, 358 U.S. at 379 n. 50, 79 S.Ct. at 484 n. 50. 28 U.S.C. § 1331, for example, is interpreted more narrowly than the Constitution permits. *Verlinden*, 461 U.S. at 494-95, 103 S.Ct. at 1971-72. The general removal statute, 28 U.S.C.

---

[4] Act of March 3, 1875, ch. 137, §2, 18 Stat. 470.

§ 1441, is also not interpreted as broadly as it could be. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108, 61 S.Ct. 868, 872, 85 L.Ed. 1214 (1941) (the "policy of the successive acts of Congress regulating the jurisdiction of the federal courts is one calling for the strict construction of (removal)") and *Willy v. Coastal Corp.*, 855 F.2d 1160 (5th Cir.1988). *See also* Collins, *The Unhappy History of Federal Question Removal*, 71 Iowa L.Rev. 717 (1986). It is clear that no federal jurisdiction exists over the present dispute under either 28 U.S.C. § 1331 or § 1441 because the issues are governed by state law and federal law is a small ingredient of the dispute. *See Gully v. First National Bank at Meridian*, 299 U.S. 109, 57 S.Ct. 96, 97, 81 L.Ed. 70 (1936) (for a suit to "arise under" federal law, a "right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action") and *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983). It is equally clear that Congress enacted 12 U.S.C. § 1819 precisely so that the FDIC could enjoy federal question jurisdiction similar to that articulated in *Osborn* and the *Pacific Railroad Removal Cases*. *See Pernie Bailey Drilling Co. v. FDIC*, 905 F.2d 78, 19-80 (5th Cir.1990); and *FDIC v. George-Howard*, 153 F.2d 591 (8th Cir.), *cert. denied*, 329 U.S. 719, 67 S.Ct. 53, 91 L.Ed. 623 (1946). Thus, § 1819 authorizes the exercise of jurisdiction over a dispute which involves only issues of state law and to which the FDIC is a party.

History does not tell us, however, whether 12 U.S.C. § 1819 supports the exercise of removal jurisdiction over an appellate proceeding. The appellants rely on *Barrow v. Hunton*, 99 U.S. 80, 25 L.Ed. 407 (1879) to argue that the removal of a post-judgment proceeding is improper. In *Barrow*, Hunton won a state court judgment.

The judgment debtor moved to have the judgment nullified and Hunton removed. The Supreme Court reasoned that if the removed proceeding was an appeal or similar to an appeal of a state court judgment, then removal would be improper because "(o)therwise, the (lower federal courts) would become invested with power to control the proceedings in the state courts, or would have appellate jurisdiction over them... Such a result would be totally inadmissible. *Id.* 99 U.S. at 83.

The appellants' reliance on *Barrow*, however, is misplaced. First, the limits which *Barrow* placed on removal jurisdiction are statutory.[5] Thus, even if we were to concede that *Barrow* is still good law for the purposes of 28 U.S.C. § 1441,[6] it is not conclusive for our purposes. Congress clearly intended that the FDIC removal statute be given a different interpretation than the general removal statute. Second, *Barrow* relied on an interpretation of removal which may well be no longer valid. *Barrow* rests on the notion that removal is like an appeal because the proceeding did not commence in federal court. The modern view of removal, however, is that it is more closely akin to original than to appellate jurisdiction because once the case

---

[5]Although Congress generally forbids the lower federal courts from entertaining appeals from state courts--*see, e.g., District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476, 482, 103 S.Ct. 1303, 1311, 1314, 75 L.Ed.2d 206 (1983) and *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16, 44 S.Ct. 149, 68 L.Ed. 362 (1923), there is no constitutional prohibition against it doing so. *See The Federalist No. 82*, at 494-95. (A.Hamilton) (Rossiter ed. 1961) ("I perceive...no impediment to the establishment of an appeal from the State courts to the subordinate national tribunals...")

[6]*See Beighley v. FDIC*, 868 F.2d 776, 781 (5th Cir. 1989) (suggesting that *Barrow's* reach has been curtailed by modern case law).

is removed, it is treated as if it had commenced in federal court. *See Freeman v. Bee Machine Co.*, 319 U.S. 448, 452, 63 S.Ct. 1146, 87 L.Ed. 1509, *rehearing denied*, 320 U.S. 809, 64 S.Ct. 27, 88 L.Ed. 489 (1943), and *Svell v. Southern Ry.*, 93 F.2d 377, 379 (5th Cir.1937). *See generally* J. Dillon, *The Removal of Causes from State Courts to Federal Courts with Forms* 4 (5th ed. 1889).

Although *Barrow* does not stand in the way of exercising jurisdiction over the instant dispute, the bare language of 12 U.S.C. § 1819 does not clearly support the exercise of jurisdiction either. That the FDIC has the authority to remove suits which "arise under" the laws of the United States to the "appropriate United States district court" does not establish the right of the FDIC to remove appellate proceedings. The FDIC contends that this right is established by 12 U.S.C. § 1821 (d)(13)(B) which states "In the event of any appealable judgment, the Corporation as conservator or receiver shall have all the rights and remedies available to the insured depository ... had the Corporation in its corporate capacity, including removal to Federal court and all appellate rights." This language makes it clear that the FDIC may not remove a suit after judgment. It does not, however, clearly establish that the FDIC may remove a case which is on appeal. One reading of 12 U.S.C. § 1821 (d)(13)(B) when it is read in pari materia with the FDIC removal statute, 12 U.S.C. § 1819(b)(2)(B), suggests that a suit may not be removed once it is on appeal because a case may be removed only to a federal district court. The majority of the cases involving post-judgment removal were removed from a state district court, not the state court of appeals, to the federal district court and then an appeal was filed or an attack was made on the judgment via Fed.R.Civ.P. 60. *See, e.g., Beighley v. FDIC*, 868 F.2d 776, 7779 (5th Cir.1989); *Northshore*

Development, Inc. v. Lee, 835 F.2d 580, 582 (5th Cir.1988); and *In re Savers Federal Savings and Loan Ass'n,* 872 F.2d 963, 964 (11th Cir.1989).[7]

In *In re Savers* a debtor sued a financial institution in state court claiming as here, breach of contract and fraud and the institution counter claimed to recover on the debtor's note. After judgment and after denial of post-trial motions for hearing, new trial, and remittitur, the FSLIC was appointed conservator of the institution. It then filed notice of removal. The district court remanded concluding that the case was completed in state court and that defendant was, in effect, seeking appeal. The Eleventh Circuit granted mandamus and vacated the remand on the basis of § 1819(b)(2)(B).

The Eleventh Circuit framed the question as "whether after there has been a final judgment by the state trial court, but when the period for appeal has not yet lapsed, a case ceased to be an 'action from a state court.'" 872 F.2d at 965-55. The court concluded that "(w)e can discern no reason to confine the interpretation of 'action' to actions that have not rendered judgment ... Had Congress intended to limit the removal power of FSLIC to suits pending before a state trial court it could have explicitly stated as much, as it did in U.S.C. § 632 ..." *Id.* at 966.

In the instant case, it is true, removal is sought from the state appellate court whereas in *Savers* no appeal had yet been filed. The significant factor, however, is that state appellate proceedings had not yet been exhausted when removal was effected. *Accord Murray v. Ford Motor Company,* 770 F.2d 461,463 (5th Cir.1985) (per curiam);

---

[7] *See also Azzopardi v. Ocean Drilling & Exploration Co.,* 742 F.2d 890 (5th Cir.1984) and *Butner v. Neustadter,* 324 F.2d 783, 785 (9th Cir.1963).

Butner v. Neustadter, 324 F.2d 783 (9th Cir.1963); *Munsey v. Testworth Laboratories, Inc.*, 227 F.2d 902, 903 (6th Cir.1955) (per curiam). In *FDIC v. Yancey Camp Development*, 889 F.2d 647, 648 (5th Cir.1989), a case which was on appeal, we allowed removal and the district court set aside a default judgment. We conclude that the FDIC is entitled to remove the instant dispute as well.

C. Procedure

Our decisions here and in *Yancey Camp*, however, entail certain procedural difficulties which we must now face. In *Yancey Camp*, the case was removed from the state court of appeals and the federal district court then entertained an attack on the removed judgment under Fed.R.Civ.P. 60. Once a case is removed, however, the federal court takes the case as it finds it on removal. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters Auto Truck Drivers*, 415 U.S. 423, 94 S.Ct. 1113, 39 L.Ed.2d 435 (1974); *In re Savers Federal Savings and Loan Ass'n*, 872 F.2d 963, 966 (11th Cir.1989); and *Butner v. Neustadter*, 324 F.2d 783, 785 (9th Cir.1963). Federal courts must "treat every thing that occurred in the state court as if it had taken place" in federal court. *In re Savers*, 872 F.2d at 966. Thus, since the instant case was on appeal in the state court when it was removed, it will be on appeal once the merits of this dispute are reached. We are certain that Congress did not intend to deprive the parties to the dispute of the right to appeal and to relegate them to relief under Fed.R.Civ.P. 60 when it authorized appellate removal by enacting the FDIC removal statute. Thus, the role of the district court must be simply to treat the removed proceeding as if it had originated in the district court and adopt the state court judgment as its own. *See*

Yancey Camp.

Since the instant appeal only deals with the district court's decision to remand, we do not reach the merits of the case. One further procedural point, however, must be addressed. When this appeal was first filed, a motion panel of this court decided not to enjoin the ongoing state appeal. Its decision is not the law of the case. *See Northshore Development, Inc. v. Lee*, 835 F.2d 580, 583 (5th Cir.1988), and *Browning v. Navarro*, 887 F.2d 553, 557 (5th Cir.1989), *reh'g denied*, 894 F.2d 99 (5th Cir.1990). An injunction is proper because once a case is removed, the state court no longer has jurisdiction over the dispute. The anti-injunction act, moreover, does not bar our injunction. Federal courts are generally barred from enjoining state court proceedings so as to preserve our system of concurrent jurisdiction. *See Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S.281, 286, 90 S.Ct. 1739, 1743, 27 L.Ed.2d 234 (1970). However, once a case is removed, the state court no longer enjoys concurrent jurisdiction over the dispute. The anti-injunction act, therefore, does not bar an injunction of a state court proceeding which purports to exercise jurisdiction over the removed case. *See French v. Hay*, 89 U.S. (22 Wall) 250, 253, 22 L.Ed. 857 (1875).[8]

---

[8] 28 U.S.C. § 1446(d) recognizes this fact by stating that after removal, the "State court shall proceed no further unless and until the case is remanded." 28 U.S.C. § 1446(d), therefore, provides support for our decision to enjoin the state court appellate proceeding. We do not rely on this statue, however, because it is not clear whether § 1446 may be utilized when removal is premised on 12 U.S.C. § 1819(b)(2). The predecessor to the current statute stated that the FDIC could "remove any such action... by following any procedure for removal now or hereafter in effect." The Financial Institutions Supervisory Act of 1966, Pub.L. No. 89-695, § 205, 80 Stat. 1028, 1055. In *In re*

(2) Sanctions.

Since we reverse the district court's decision to remand the instant appeal, it is clear that its award of sanctions for improper removal must also be reversed.

Conclusions

The decision of the district court remanding this matter and assessing sanctions is REVERSED and REMANDED. Further state court proceedings are hereby ENJOINED.

PATRICK E. HIGGINBOTHAM, Circuit Judge, concurring in part and dissenting in part:

I concur in the reversal of the sanctions order, but I dissent from the remainder of my colleagues' thoughtful opinion. The case is difficult and perplexing, but I am persuaded of a different course. 12 U.S.C. § 1819 (b)(2)(B) does not permit the FDIC to remove all cases pending on appeal in the state courts. The statute limits the right of removal to cases over which the district court may

---

Savers Federal Savings & Loan Assoc., 872 F.2d 963, 965 (__Cir.1989), for example, the court held that the procedural strictures of § 1446 governed removal under 12 U.S.C. § 1730(k)(1) (repealed by FIRREA, Pub.L. 101-73, Title IV, § 407, 103 Stat. 363 (1989)) which employed language similar to the now repealed FDIC removal statute. The current FDIC removal statute says nothing about the procedure which is to be followed on removal and it is possible, therefore, that § 1446 no longer governs FDIC removal. *See Resolution Trust Corp. for Sandia Federal Sav. Assn. v. Key*, 733 V.Supp. 1086, 1089 (N.D.Tex.1990) (holding that 28 U.S.C. § 1446 does not govern removal by the Resolution Trust Corporation). Since we do not rely directly on § 1446, we need not to decide this issue.

exercise some original jurisdiction. It does not forbid all removals from state appellate courts. It permits them when Rule 60 relief is available and sought. But that is not this case.

I find the majority's reading of the statute to be implausible, not required by precedent, and to rest upon judicial creation of new procedural tracks for removal without Congressional warrant. The majority leaves us with unacceptable alternatives: we must either permit the federal district courts to exercise appellate jurisdiction over state trial judgments, or require them to enter judgments that do not reflect their own judgment at all. The majority chooses the latter path, imposing a clerk's role on the Article III courts; but neither alternative is consistent with the statute or the res of the federal jurisdictional legislation.

I.

12 U.S.C. § 1819(b)(2)(A) provides that, subject to exceptions not applicable here, all civil suits to which the FDIC is a party are deemed to arise under the laws of the United States. 12 U.S.C. § 1819(b)(2)(B) provides that the FDIC may remove any such action suit, or proceeding from "a State court to the appropriate United States district court." These subsections expand the original and removal jurisdiction of the district courts, as they permit the FDIC to bring actions which, because of their subject matter, would ordinarily have been matters for the state courts. *Carrollton-Farmers Branch Independent School District v. Johnson & Cravens, 13911, Inc.*, 889 F.2d 571 (5th Cir.1989); *Triland Holdings & Co. v. Sunbelt Service Corp.*, 884 F.2d 205 (5th Cir.1989).

To permit the FDIC to remove this case, however, my brothers read the statute to do far more than add a new class of cases to the district courts' federal question

jurisdiction. They read it to permit the FDIC to remove cases to the district courts regardless of their procedural posture (so long as they are still pending somewhere in the state system). Ultimately, their reading is necessarily premised on an assumption that the general federal question removal statutes, 28 U.S.C. §§ 1441-1451, permit this as well. I do not think these statutes can bear that freight.

A.

The majority opinion suggests that § 1819(b)(2) creates in the FDIC a right of removal independent of the general removal statutes. As I noted, this is true to a point--the FDIC may remove any case to which it is a party, and is not constrained by the subject matter limits that bind other parties. But to conclude, without reference to the general removal statutes that § 1819(b)(2) permits removal of any pending case regardless of procedural posture, we must find in FIRREA an independent procedural track for removed cases. I can find none, and must assume that Congress intended to rely on the procedural track established in the general removal statutes. For example, § 1819(b)(2)(B) provides that removal must be to the "appropriate" district court. As "appropriate" is not defined for these purposes in FIRREA or anywhere else in the United States Code, it necessarily refers to the venue provision in 28 U.S.C. § 1441(a). That is, removal must be to the district court for the district and division in which the action is pending. Further, FIRREA simply makes no provision for much of the mechanics of removal. If the general removal statutes are not the guide, how is the FDIC to let the district court know it wishes to remove the case? How is the other party to oppose the removal? What happens to the proceedings in state court upon removal? What if the district court determines removal is not proper?

It strains credulity to say that we are not to look to the general removal statutes for the answers.

When Congress wished to depart from the ordinary procedural track in FIRREA, it said so explicitly. That we are deciding this case at all proves the point, for ordinarily we do not hear appeals of remand orders--we are hearing this one because 12 U.S.C. § 1819(b)(2)(C) compels us to do so. But these express departures are few and far between, and do not in any sense constitute an entire procedural track. My brothers apparently do not dispute this, for their holding ultimately relies substantially upon cases involving removal under the general statutes.

B.

The argument that parties may remove all cases on appeal in the state court system relies upon the language of § 1819(b)(2), the general removal statutes and decisions which purportedly have read that language to permit such removal. Specifically, the argument urges that § 1441(a)'s language permitting the removal of "any such action, suit, or proceeding from a state court" means exactly what it says. Section 1819(b)(2)(B) likewise provides for removal of any action "from a State Court." The argument continues that the cases clearly establish that any action may be removed until the state appellate process has been exhausted.

I agree that we should give a plain meaning to the statutory language to provide for the removal of "any" action, suit, or proceeding "from a State Court." Congress swept broadly in describing the types of removable actions--"any" means just that. But, despite the breadth of the description of the categories of removable cases, the statute is silent as to their procedural posture. We could read these statutes to authorize removal regardless of procedural

posture, which could include even cases under submission to a state's highest court. That is the position the majority takes. It has also been argued that we should not go that far. This approach, understandably recoiling at the prospect of removal an instant before complete appellate exhaustion, asserts that at some point in the state appellate process, and action ceases to be removable--perhaps after an intermediate appellate decision. I do not find the principle that supports this limit, once one subscribes to the idea that the statute's broad language is more than a broad description of the category of removable cases. If the statute's broad language is not read as an effort to sweep broadly only in describing the type of removable litigation, but is rather read as describing all cases regardless of procedural posture, there is no point in the appellate process where removal will defy the statute.

These difficulties in themselves would lead me to have serious questions about the majority's reading of the statutes. But in any event I am persuaded that the statutes' plain language imposes the limit I have suggested. I have said that I believe that "any" refers solely to the type of cases that are removable, not to their procedural posture. The language of § 1441(a) confirms my belief. While the statutes provide for the removal of any action, suit, or proceeding from a state court, § 1441(a) states that to be removable, the case must be one over which the district court has original jurisdiction. This limit of course functions primarily to restrict the types of cases that may be removed, but it also serves to ensure that the district court will exercise *original* jurisdiction, and no other kind, over them.

Whatever jurisdiction the district court exercises over cases removed from state appellate courts, it cannot be original, if the time for relief from trial judgment has run. If the district court were to undertake a full examination of

the merits, it would in effect exercise appellate jurisdiction over the state trial court's judgment. That this contravenes the removal statutes and works a radical change in the federal jurisdictional legislation is plain. *See Barrow v. Hunton*, 99 U.S. 80, 25 L.Ed. 407 (1879). *See also District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983); *Atlantic Coast Line R. Co. v. Locomotive Engineers*, 398 U.S. 281, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923). Perhaps for this reason, my brothers opt for the other approach, and require the district courts to rubber stamp the trial judgments in these cases, so that they may be brought to the federal courts for review.

There are no fewer problems with this approach. It simply vests federal appellate jurisdiction over the state court's judgment in the circuit courts, rather than the district courts. And while it prevents the district courts from exercising appellate jurisdiction over the state trial judgments, it does not permit them to exercise original jurisdiction. It would take an overly strained reading of the term to conclude that the majority's rubber stamp process constitutes the exercise of original jurisdiction. Finally, this approach has the added disadvantage of imposing a judicially crafted exception to the procedural track Congress established for removal. I find it difficult to believe that when Congress provided for state cases to be removed to district courts, it intended that the district courts would be required to enter the state court judgment as its own. Congress can define jurisdiction, but it cannot dictate the outcome of an exercise of Article III power. *United States v. Klein*, 13 Wall. 128, 20 L.Ed. 519 (1871); *Glidden Co. v. Zdanok*, 370 U.S. 530, 82 S.Ct. 1459, 8 L.Ed.2d 671 (1962). Further, I think it plain that if Congress intended

that removed cases flow directly to the United States Court of Appeals, it would have said so.

Nonetheless, if our cases permitted removal in these circumstances, we would be bound to permit it here, for we cannot overrule prior panels. But unlike my brothers, I do not read our cases so broadly.

It is of course plain that no case may be removed once the state appellate process has been exhausted. *See Four Keys Leasing and Maintenance Corp. v. Simithis*, 849 F.2d 770 (2d Cir.1988); *Ristuccia v. Adams*, 406 F.2d 1257 (9th Cir.), *appeal dismissed and cert. denied*, 396 U.S. 1, 90 S.Ct. 24, 24 L.Ed.2d 3 (1969); *Mestice v. McShea*, 201 F.2d 363 (3d Cir.1953). It is equally beyond dispute that any case may be removed prior to trial judgment, provided the other criteria for removal are met. But, as I will demonstrate, things are not as clear in the gray area between trial judgment and appellate exhaustion. Principled line-drawing thus becomes necessary, and must be undertaken with strict attention to the removal scheme Congress has carefully crafted.

We have faced the issue of post-trial-judgment removal only a few times. In *Murray v. Ford Motor Co.*, 770 F.2d 461 (5th Cir.1985), the plaintiff brought a products liability action against Ford in a Texas court. The Texas court set Ford's appearance date for a Tuesday, but Ford removed on the previous Friday. The Texas court did not receive notice of the removal, so when Ford failed to appear on Tuesday, the court entered a default judgment for the plaintiff. Ford convinced the district court to set the judgment aside under Rule 60(b)(6). We held this relief was inappropriate, but affirmed because Rule 60(b)(1) relief was still available.

FDIC v. Yancy Camp Development Co., 889 F.2d 647 (5th Cir.1989) presented circumstances more similar to

those we now face. YCD filed an application in Texas court for a writ of garnishment against Highland Park National Bank, in an effort to collect a judgment against an entity YCD incorrectly believed had deposits at the bank. Internal problems prevented the bank from filing a timely answer, and the Texas court entered a default judgment for YCD. The bank appealed to the Texas Court of Civil Appeals, but went insolvent while the case was pending. The FDIC intervened and removed to the district court, seeking Rule 60(b) relief. We held the district court improperly refused to grant the relief. We did not discuss the removal question further than to say "(a) state court judgment in a case properly removed to federal court--like the one before us--can be vacated under Federal Rule of Civil Procedure 60(b)." 889 F.2d at 648.

In *Beighley v. FDIC*, 868 F.2d 776 (5th Cir.1989), the FDIC did not receive notice of the plaintiff's suit against the failed bank until after the state court had entered a default judgment in the plaintiff's favor. The FDIC filed motions in the state court to vacate and for new trial, but removed before the state court could rule on them. We held the removal proper.

We also held removal proper in *Northshore Development Inc. v. Lee*, 835 F.2d 580 (5th Cir.1988). There, the savings and loan had a judgment in its favor reversed by an intermediate Louisiana appellate court; that court further held the opposing party was entitled to damages against the savings and loan for wrongful issuance of a temporary restraining order and injunctions. The appellate court remanded the case to the trial court to fix damages. After the trial court made its award, the FSLIC intervened and removed the case to the district court seeking relief from judgment under Rule 60(b).

We have also permitted a district court on removal to set aside a default judgment against a Jones Act

defendant. *Azzopardi v. Ocean Drilling & Exploraiton Co.*, 742 F.2d 890 (5th Cir.1984). The Ninth Circuit has permitted a district court on removal to set aside a default judgment against a diverse defendant on a state law claim. *Butner v. Neustadter*, 324 F.2d 783 (9th Cir.1963). In *Munsey v. Testworth Laboratories, Inc.*, 227 F.2d 902 (6th Cir.1955), the Sixth Circuit did likewise.

A search for an explicit unifying principle in these cases is in vain. Their language equally supports two implicit possibilities--that cases may be removed any time prior to final appellate judgment, or that cases may be removed only as long as the district court may exercise some form of original jurisdiction over the case, even if only of the limited Rule 50 variety. My reading of the removal statutes leads me to opt for the latter. Our holding in *Yancey Camp* does not compel otherwise. The case there was removed from a state appellate court, but the FDIC sought Rule 60 relief, the exercise of original jurisdiction. This is consistent with our ordinary procedure. When a party in a case before us seeks Rule 60 relief, we remand to the district court for that determination before considering the appeal.

II.

The Eleventh Circuit, the only other circuit to have considered the problem, has taken the majority's position. The Eleventh Circuit held the FSLIC could remove a case after trial judgment, but before the time for appeal has lapsed. The court approached the case the same way the majority does, and added that if Congress had intended to otherwise limit the right of removal to a particular point in the proceedings, it could have said so explicitly. Indeed, Congress did just that in 12 U.S.C. § 632 (1982), limiting the power of a Federal Reserve member bank to remove a

suit to "any time before the trial thereof." *In re Savers Federal Savings and Loan*, 872 F.2d 963, 964 (11th Cir.1989). I am not persuaded that the failure to place similar language in FIRREA compels the majority's reading. No such language is in the general removal statutes either; the limit comes from the emphasis on original jurisdiction. Finally, the Eleventh Circuit did not address the difficulties of its holding, particularly the absence of fresh procedural tracks in FIRREA.

(APPENDIX H)

Order of Rehearing En Banc

In the Matter of MEYERLAND CO., and William M. Adkinson,
FEDERAL DEPOSIT INSURANCE CORP.

as Manager of the FSLIC Resolution Fund
as Receiver for Continental Savings Association
v.
Meyerland Co. and William Adkinson.

United States Court of Appeals, Fifth Circuit
No. 89-6118
December 27, 1990

Appeal from the United States District Court
for the Southern District of Texas

On Petition for rehearing and suggestion for rehearing en banc

(Opinion September 7, 1990, 5 Cir., 1990, ___F.2d___)

Before CLARK, Chief Judge, GEE, POLITZ, KING, JOHNSON, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS SMITH, DUHE', WIENER and BARKSDALE, Circuit Judges.*

BY THE COURT:

A member of the Court in active service having requested a poll on the suggestion for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that this cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. A majority of the panel enjoined further proceedings in this cause in the state courts of Texas. Because it is necessary in aid of our jurisdiction, we continue that injunction pending the completion of en banc review. 28 U.S.C. 2283. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

*Judge Jones is recused, and therefore did not participate in this decision

(APPENDIX I)

Order Dismissing Appeal for Want of Jurisdiction

On Appeal from the 269th District Court
Harris County, Texas

MEYERLAND CO. and William M. Adkinson, Appellants
v.
Continental Savings Association, Appellee

In The Court of Appeals
For the First District of Texas
No. 01-87-0730-CV
Trial Court Cause No. 86-36700
July 16, 1992.

The Court today considered the "Motion to Dismiss Appeal for Want of Jurisdiction and Resurgence of Motion for Withdrawal and Substitution of Counsel" of the Federal Deposit Insurance Corporation as Receiver for Continental Savings Association. The motion to dismiss appeal for want of jurisdiction is hereby granted. The motion for withdrawal and substitution of counsel has been granted in a separate order.

It is so ORDERED.

Panel consists of Chief Justice Oliver-Parrott and Justices

Dunn and Wilson.

Do not publish. Tex. R. App. P. 90.

(APPENDIX J)

Judgment on Rehearing En Banc

In the matter of MEYERLAND CO.
and William M. ADKINSON,

FEDERAL DEPOSIT INSURANCE CORPORATION
as Manager of the FSLIC Resolution Fund
as Receiver for Continental Savings Association,
v.
MEYERLAND CO. and William Adkinson,
No. 89-6118

United States Court of Appeals, Fifth Circuit
D.C. Docket No. CA-89-3015
Filed May 15, 1992 U.S. Court Appeals
Filed June 5, 1992 U.S. District Court
Southern District of Texas
Issued as Mandate June 4, 1992

Appeal from the United States District Court
for the Southern District of Texas

Before POLITZ, Chief Judge, REYNALDO G. GARZA, KING GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS SMITH, DUHE', WIENER, EMILIO M. GARZA, and DEMOSS, Circuit Judges.*

JUDGEMENT ON REHEARING EN BANC

This cause came on to be heard on rehearing en banc and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court remanding this cause and assessing sanctions is reversed; its remand order is vacated and this cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that appellees pay to appellant the costs on appeal to be taxed by the Clerk of this Court.

May 13, 1992

*Judges Edith H. Jones and Rhesa H. Barksdale are recused.
DeMOSS, Circuit Judge, specially concurring.
POLITZ, Chief Judge, with whom GARWOOD, HIGGINBOTHAM, WIENER, and EMILIO M. GARZA, Circuit Judges, join, dissenting.

(APPENDIX K)

Fed. R. Civ. P. 6

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), 60(b), and 74(a), except to the extent and under the conditions stated in them.

(APPENDIX L)

Fed. R. Civ. Pro. 59

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

(APPENDIX M)

Fed. R. Civ. P. 60

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.
(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On Motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable

time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.
(Amended Aug.1, 1987.)

(APPENDIX N)

28 USC § 1345

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.
(June 25, 1948, ch. 646, 1, 62 Stat. 933.)

(APPENDIX O)

28 USC § 1441

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter (28 USC 1441 et seq.), the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may

be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

(APPENDIX P)

28 USC § 1446

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by

section 1332 of this title more than 1 year after commencement of the action.

(c)(1) A petition for removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the petitioner leave to file the petition at a later time.

(2) A petition for removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the petition shall constitute a wavier of such grounds, and a second petition may be filed only on grounds not existing at the time of the original petition. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a petition for removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the petition is first denied.

(4) The United States district court to which such petition is directed shall examine the petition promptly. If is clearly appears on the face of the petition and any exhibits annexed thereto that the petition for removal should not be granted, the court shall make an order for its summary dismissal.

(5) If the United States district court does not order the summary dismissal of such petition, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the petition as justice shall require. If the United States district court determines that such petition shall be granted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Promptly after the filing of such petition for the removal of a civil action and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(e) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.
(June 25, 1948, ch 646, § 1, 62 Stat. 939; May 24, 1949, ch 139, § 83, 63 Stat. 101; Sept. 29, 1965, P.L. 89-215, 79 Stat. 887; July 30, 1977, P L. 95-78, § 3, 91 Stat. 321; Nov. 19, 1988, P.L. 100-702, Title X, § 1016(b), 102 Stat. 4669.)

(APPENDIX Q)

28 USC § 1447

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a) (28 USC § 1446(a)). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section

1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.
(June 25, 1948 ch 646, § 1, 62 Stat. 939; May 24, 1949, ch 139,
§ 84, 63 Stat. 102; July 2, 1964, P.L. 88-352, Title IX, § 901, 78 Stat. 266; Now. 19, 1988, P.L. 100-702, Title X, § 1016(c), 102 Stat. 4670.)

(APPENDIX R)

28 USC § 1257

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

(June 25, 1948, ch 646, § 1, 62 Stat. 929; July 29, 1970, P.L. 91-358, Title I, Part D, Subpart 2, § 172(a)(1), 84 Stat. 590; June 27, 1988, P. L. 100-352, § 3, 102 Stat. 662.)

(APPENDIX S)

12 USC § 1819

(a) In general. Upon the date of enactment of the Banking Act of 1933 (enacted June 16, 1933), the Corporation shall become a body corporate and as such shall have power-
First. To adopt and use a corporate seal
Second. To have succession until dissolved by an Act of Congress.
Third. To make contracts.
Fourth. To sue and be sued, and complain and defend, in any court of law or equity, State or Federal.
Fifth. To appoint by its Board of Directors such officers and employees as are not otherwise provided for in this Act, to define their duties, fix their compensation, require bonds of them and fix the penalty thereof, and to dismiss at pleasure such officers or employees. Nothing in this or any other Act shall be construed to prevent the appointment and compensation as an officer or employee of the Corporation of any officer or employee of the United States in any board, commission, independent establishment, or executive department thereof.
Sixth. To prescribe, by its Board of Directors, bylaws not inconsistent with law, regulating the manner in which its general business may by conducted, and the privileges granted to it by law may be exercised and enjoyed.
Seventh. To exercise by its Board of Directors, or duly authorized officers or agents, all powers specifically granted by the provisions of this Act, and such incidental powers as

shall be necessary to carry out the powers granted.
Eighth. To make examinations of and to require information and reports from depository institutions, as provided in this Act.
Ninth. To act as receiver.
Tenth. To prescribe by its Board of Directors such rules and regulations it may deem necessary to carry out the provisions of this Act or of other law which it has the responsibility of administering or enforcing (except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to any other regulatory agency).

(b) Agency authority. (1) Status. The Corporation, in any capacity, shall be an agency of the United States for purposes of section 1345 of title 28, United States Code, without regard to whether the Corporation commenced the action.
(2) Federal court jurisdiction.

(A) In general. Except as provided in subparagraph (D), all suits of a civil nature at common law or in equity to which the Corporation, in any capacity, is a party shall be deemed to arise under the laws of the United States.

(B) Removal. Except as provided in subparagraph (D), the Corporation may, without bond or security, remove any action, suit, or proceeding from a State court to the appropriate United States district court.

(C) Appeal of remand. The Corporation may appeal any order of remand entered by any United States district court.

(D) State actions. Except as provided in subparagraph (E), any action-

(i) to which the Corporation, in the Corporation's capacity as receiver of a State insured depository institution by the exclusive appointment by State authorities, is a party other than as a plaintiff;

(ii) which involves only the pre-closing rights against the State insured depository institution, or obligations owing to, depositors, creditors, or stockholders by the State insured depository institution; and

(iii) in which only the interpretation of the law of such State is necessary, shall not be deemed to arise under the laws of the United States.

(E) Rule of construction. Subparagraph (D) shall not be construed as limiting the right of the Corporation to invoke the jurisdiction of any United States district court in any action described in such subparagraph if the institution of which the Corporation has been appointed receiver could have invoked the jurisdiction of such court.

(3) Service of process. The Board of Directors shall designate agents upon whom service of process may be made in any State, territory, or jurisdiction in which any insured depository institution is located.

(4) Bonds or fees. The Corporation shall not be required to post any bond to pursue any appeal and shall not be subject to payments of any filing fees in United States district courts or courts of appeal.

(Sept. 21, 1950, ch 967, § 2(9), 64 Stat. 881; Oct. 16, 1966, P. L. 89-695, Title II, § 205, 80 Stat. 1055; Nov.

10, 1978, P. L. 95-630, Title III, § 309, 92 Stat. 3677.) (As amended Aug. 9, 1989, P. L. 101-73, Title II, § 201(a)(1), 209, 103 Stat. 187, 216.)

(APPENDIX T)

12 USC § 1821(d)(13)

(A) Prior final adjudication. The Corporation shall abide by any final unappealable judgment of any court of competent jurisdiction which was rendered before the appointment of the Corporation as conservator or receiver.

(B) Rights and remedies of conservator or receiver. In the event of any appealable judgment, the Corporation as conservator or receiver shall--

(i) have all the rights and remedies available to the insured depository institution (before the appointment of such conservator or receiver) and the Corporation in its corporate capacity, including removal to Federal court and all appellate rights; and

(ii) not be required to post any bond in order to pursue such remedies.

QUESTION PRESENTED

Whether the Federal Deposit Insurance Corporation may remove a case pending in a state appellate court to the appropriate United States district court under 12 U.S.C. 1819(b)(2)(B) (Supp. III 1991).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	18

TABLE OF AUTHORITIES

Cases:

American Nat'l Red Cross v. *S.G.*, 112 S. Ct. 2465 (1992)	16
Church of Scientology v. *United States*, No. 91-946 (Nov. 16, 1992)	11
Connecticut Nat'l Bank v. *Germain*, 112 S. Ct. 1146 (1992)	14
Duncan v. *Gegan*, 101 U.S. 810 (1880)	9
FDIC v. *Kahlil Zoom-In Markets, Inc.*, No. 92-1339 (5th Cir. Nov. 13, 1992)	9
5300 Memorial Investors, Ltd. v. *RTC*, 973 F.2d 1160 5th Cir. 1992)	9, 10
Granny Goose Foods, Inc. v. *Brotherhood of Teamsters, Local No. 70*, 415 U.S. 423 (1974)	8, 9
Jackson v. *American Savings Mortgage Corp.*, 924 F.2d 195 (11th Cir. 1991)	12
Martin v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816)	16
Pacific R.R. Removal Cases, 115 U.S. 1 (1885)	16
Parsons v. *Bedford*, 28 U.S. (3 Pet.) 433 (1830)	17
Resolution Trust Corp., In re, 888 F.2d 57 (8th Cir. 1989)	12
Savers Fed. Savings & Loan Ass'n, In re, 872 F.2d 963 (11th Cir. 1989)	12, 14, 17
The Justices v. *Murray*, 76 U.S. (9 Wall.) 274 (1870)	17
Walker v. *FDIC*, 970 F.2d 114 (5th Cir. 1992)	9, 10, 11
Ward v. *RTC*, 972 F.2d 196 (8th Cir. 1992)	12, 16

Constitution, statutes and rules: Page

U.S. Const.:
Art. III 7
Amend. VII 15, 17
Amend. X 15
Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 161(d), 105 Stat. 2286 3
Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 3
§ 401, 103 Stat. 354 3
12 U.S.C. 632 14
12 U.S.C. 1730(k)(1) 2
12 U.S.C. 1819 (Supp. III 1991) 3, 5, 13, 16, 17
12 U.S.C. 1819(b)(2) (Supp. III 1991) 11, 13
12 U.S.C. 1819(b)(2)(A) (Supp. III 1991) 3, 10, 16
12 U.S.C. 1819(b)(2)(B) (Supp. III 1991) 3, 4, 6, 7, 14
12 U.S.C. 1819(b)(2)(C) (Supp. III 1991) 3
28 U.S.C. 1331 16
28 U.S.C. 1441-1451 (1988 & Supp. III 1991) 6
28 U.S.C. 1441(a) 7
28 U.S.C. 1447(d) 3
28 U.S.C. 1450 9
Fed. R. Civ. P.:
Rule 59 ..... 9, 17
Rule 59(e) 12
Rule 60 ..... 7, 9, 17
Rule 60(a) 7
Rule 60(b) 7, 11, 12

Miscellaneous:

H.R. Rep. No. 54, 101st Cong., 1st Sess. Pt. I (1989) 15
C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* (1985) 16

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-590

MEYERLAND COMPANY AND WILLIAM MICHAEL ADKINSON, PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. 1a-30a) is reported at 960 F.2d 512. The order of the district court (Pet. App. 46a-47a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 78a-79a) was entered on May 13, 1992. The petition for a writ of certiorari was filed on August 11, 1992. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Meyerland Company was the obligor on a $25 million note held by Continental Savings Association. Petitioner William M. Adkinson was the president of Meyerland and guarantor of the debt. The note was also secured by a portion of the Meyerland Plaza Shopping Center. Meyerland made no payments on the note, and in September 1986 Continental posted the property for foreclosure. Meyerland filed suit in state court against Continental, seeking a temporary restraining order and damages for, among other things, usury and fraud. Continental counterclaimed, seeking recovery on the note and the guaranty and damages for fraud and breach of contract. See Pet. App. 2a. After a jury trial, the state trial court awarded Continental damages of approximately $30 million, partially offset by an award of approximately $1.1 million in favor of petitioner Adkinson. *Id.* at 2a, 41a. Petitioners appealed to the state court of appeals. *Id.* at 2a.

2. On September 26, 1988, while the state court appeal was pending, the Federal Home Loan Bank Board declared Continental insolvent and appointed the Federal Savings and Loan Insurance Corporation (FSLIC) as receiver. On October 26, 1988, FSLIC removed the case to the United States District Court for the Southern District of Texas, acting under 12 U.S.C. 1730(k)(1) as then in effect. See Pet. App. 5a. The district court, however, remanded the case to the state appellate court on April 21, 1989. See *id.* at 2a, 44a-45a.

3. On August 9, 1989, the President signed the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (FIRREA). Section 401 of FIRREA, 103 Stat. 354, abolished FSLIC and automatically su-bstituted the Federal Deposit Insurance Corporation (FDIC) as FSLIC's successor in ongoing litigation. On September 7, 1989, the FDIC again removed this case to federal district court, this time acting under 12 U.S.C. 1819, as amended by FIRREA. Pet. App. 2a. Section 1819(b)(2)(A) provides that, with immaterial exceptions, "all suits of a civil nature at common law or in equity to which the [FDIC], in any capacity, is a party shall be deemed to arise under the laws of the United States." Section 1819(b)(2)(B) provides that the FDIC may, again with immaterial exceptions, "remove any action, suit, or proceeding from a State court to the appropriate United States district court."[1] On September 29, 1989, the district court again remanded the case to the state appellate court, and awarded $2,500 in sanctions against the FDIC for having attempted the removal. Pet. App. 2a, 46a-47a.

4. The FDIC appealed the district court's remand order pursuant to 12 U.S.C. 1819(b)(2)(C) (Supp. III 1991), which varies the normal rule (see 28 U.S.C. 1447(d)) by providing that the FDIC may appeal such orders. A divided panel of the court of appeals

---

[1] Section 1819(b)(2)(B) was amended in 1991 to require that any such removal take place "before the end of the 90-day period beginning on the date the action, suit, or proceeding is filed against the [FDIC] or the [FDIC] is substituted as a party." Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 161(d), 105 Stat. 2286.

reversed. Pet. App. 52a-73a. Rehearing en banc was granted, *id.* at 74a-75a, and the full court again held in favor of the FDIC, reversing both the district court's remand order and the award of sanctions. *Id.* at 1a-30a.

The court of appeals first recognized, Pet. App. 3a-7a, that this case involved "jurisdictional and removal provisions giving the FDIC broad power to gain access to federal courts in actions to which it is a party pursuant to FIRREA." *Id.* at 3a. Noting that those provisions had been broadly construed in favor of the FDIC, the court explained that "[a]ccess to federal courts in all actions to which it is a party allows the FDIC to develop and rely on a national and uniform body of law." *Id.* at 4a. In this general context, the court approached the specific issue in this case by considering "the plain language and meaning of FIRREA, the Constitutional authority of Congress to grant this sort of removal jurisdiction, and whether there is any reason to think that Congress could not have intended this result." *Id.* at 7a.

The court agreed with the FDIC, Pet. App. 7a-8a, that Section 1819(b)(2)(B), on its face, allowed removal of this case:

> The statute's plain language is quite plain: Any action in a state court may be removed. This language does not limit removable actions to those that have not yet reached a state trial court judgment, nor does it limit removable actions to those that come to the federal courts from a specific state court (i.e., from state trial, as opposed to appellate, court).

Id. at 8a. The court concluded, *id.* at 9a, that under the statutory language the only significant consideration was whether state appellate proceedings had been fully exhausted when removal was attempted. Moreover, the court concluded that although it had seldom done so, Congress had clear constitutional power to authorize removal of cases on appeal. *Id.* at 10a.

The court found nothing in the history of removal jurisdiction that would require a more restrictive reading of Section 1819 than its language would otherwise indicate. Pet. App. 10a-13a. Indeed, the court found it clear that Congress enacted Section 1819 "precisely so that the FDIC could enjoy federal question jurisdiction" of the broadest sort constitutionally permissible. *Id.* at 13a. In addition, the court reviewed various other procedural advantages granted to the FDIC by FIRREA, and concluded that allowing removal of cases on appeal was consistent with the overall scheme and underlying goals of the statute. Pet. App. 13a-15a.

Finally, the court of appeals considered the procedural aspects of removal from a state appellate court to federal district court. Pet. App. 15a-18a. The court found it unnecessary to consider the propriety of having a federal district court conduct "appellate" review of a state trial court judgment after removal, *id.* at 15a, because it found it sufficient for the district court to "take the state judgment as it finds it, prepare the record as required for appeal, and forward the case to a federal appellate court for review." *Id.* at 15a-16a. In this way, the case would "simply com[e] into the federal system in the same condition in which

it left the state system." *Id.* at 17a. Pointing to the frequently ministerial actions performed by district courts on remand of cases from the courts of appeals, the court found unpersuasive petitioners' argument that reducing the district court's role on removal to "rubber-stamping" the state trial court's judgment would deprive the federal court of a justiciable "case or controversy." *Id.* at 16a.

The court concluded, Pet. App. 17a-18a, by noting that it did not intend to suggest that the FDIC removal provisions effected a wholesale replacement of the general removal statutes, 28 U.S.C. 1441-1451 (1988 & Supp. III 1991). It held only that to the extent the "specific powers or mechanisms" of FIRREA were inconsistent with the general removal statutes, the more specific provisions must be deemed to control. Pet. App. 17a-18a.

Judge DeMoss concurred specially, Pet. App. 18a-20a, on the basis of the 1991 amendment providing that the FDIC must initiate removal under Section 1819(b)(2)(B) within 90 days of the later of the date the action is filed or the date the FDIC is substituted as a party. See note 1, *supra*. Although otherwise inclined to find that the statutory language did not address the issue of removal on appeal, he concluded from the language and structure of the amendment that Congress had considered the issue and intended that where the FDIC was substituted as a party, the fact that the case might be on appeal in the state system should be immaterial to the agency's right to remove it to federal court. Pet. App. 19a-20a.

Five judges dissented. Pet. App. 20a-30a. The dissenters believed that the "broad statutory

language" addressed only the type of cases that could be removed, not their trial or appellate status. *Id.* at 23a. They therefore rejected a statutory construction that would require federal district courts either "to sit as appellate courts over the removed state court cases," which would require them to exercise appellate rather than "original" jurisdiction (see 28 U.S.C. 1441(a)), or "to 'rubber stamp' state court judgments and forward them to federal appellate courts for review," in which case they would not have before them a "case or controversy" of the sort required to support federal jurisdiction under Article III of the Constitution. Pet. App. 24a-25a & n.7. After reviewing, *id.* at 26a-29a, a variety of hypothetical procedural questions that might arise in a case removed after judgment in the state trial court, the dissent concluded, *id.* at 29a-30a, that its jurisdictional and procedural concerns could be satisfied by allowing post-judgment removal to the district court only where that court could properly grant relief from the state court's judgment under Rule 60 of the Federal Rules of Civil Procedure.[2]

---

[2] Rule 60(a) allows a district court to correct clerical errors and errors of "oversight or omission" at any time, but only with leave of the appellate court where an appeal has been docketed. Rule 60(b) allows the court to relieve a party from a final judgment for a variety of reasons, including mistake or inadvertence, newly discovered evidence, fraud, reversal of a predicate judgment, other inequity of continued application, or "any other reason justifying relief." Any motion for relief must be made "within a reasonable time" after entry of the judgment from which relief is sought; where the ground is mistake, new evidence or fraud, that time may not exceed one year.

ARGUMENT

1. Petitioners' principal contention (Pet. 7-12, 20-22) is that a case may not be removed to a federal district court while pending in a state appellate court, because the somewhat unusual procedural posture of such a case on removal would vitiate the federal court's jurisdiction. Petitioners argue that a federal district court cannot exercise original jurisdiction once the state trial court's plenary jurisdiction has been cut off by the entry of judgment and the subsequent filing of a state appeal. Pet. 11.[3] Indeed, petitioners maintain that the district court may not take even the procedural steps approved by the court of appeals in this case to "prepare the record as required for appeal, and forward the case to a federal appellate court for review," Pet. App. 15a-16a, because in doing so the district court would have no meaningful opportunity to act on a justiciable "case or controversy." See Pet. 20-22.

It is true that in cases removed under Section 1819(b)(2)(B) it is incumbent upon the federal courts "to deal with the unique problem of a shift in jurisdiction in the middle of a case which arises whenever cases are removed from state to federal court." *Granny Goose Foods, Inc.* v. *Brotherhood of Teamsters, Local No. 70*, 415 U.S. 423, 435 (1974). As the court below found, however, it is straightforward

[3] Petitioners also argue that a federal district court can never exercise "appellate" jurisdiction over a state court judgment. Pet. 11; see also Pet. App. 22a-24a (dissenting opinion). The court of appeals found it unnecessary to consider this argument in light of the post-removal procedure it prescribed. Pet. App. 15a.

to address that problem in this case by heeding this Court's instruction that "[a]fter removal, the federal court 'takes the case up where the State court left it off.' " *Id.* at 436 (quoting *Duncan* v. *Gegan*, 101 U.S. 810, 812 (1880)). That is, all that has occurred in state court will be deemed to have occurred in federal court, 415 U.S. at 435-436; see 28 U.S.C. 1450, so that the case "simply comes into the federal system in the same condition in which it left the state system." Pet. App. 17a. In this case, because initial proceedings in the state trial court had been concluded and an appeal perfected at the time of removal, it was appropriate for the district court to "take the state judgment as it [found] it," *id.* at 15a, and to take only such steps as were necessary to allow the appeal to proceed in the federal system.

The operation of the procedure approved by the court of appeals in this case is illustrated by *5300 Memorial Investors, Ltd.* v. *RTC*, 973 F.2d 1160, 1162-1163 (5th Cir. 1992), and *Walker* v. *FDIC*, 970 F.2d 114 (5th Cir. 1992), in each of which the same court subsequently approved a district court's adoption of a state court judgment after removal. See also *FDIC* v. *Kahlil Zoom-In Markets, Inc.*, No. 92-1339 (5th Cir. Nov. 13, 1992) (no appellate jurisdiction until district court enters a final judgment, but district court may adopt state court's judgment as its own). By entering judgment the district court puts the case, formerly conducted under state court rules, into a proper federal procedural posture. The district court is then in the same position, with the same rights and powers to act (such as by granting relief, if available, under Fed. R. Civ. P. 59 or 60) as it would have been if the

case had originated in federal court. If an adopted state court judgment is incorrect, that can and will be determined by the federal court of appeals on direct review. See *5300 Memorial Investors*, 973 F.2d at 1163-1164 (vacating the judgment adopted by the district court and remanding the case to that court for retrial); *Walker*, 970 F.2d at 124 (reversing and remanding in part state decision adopted by district court).[4]

Petitioners' contention that the role of the district court on removal is too insubstantial to support federal jurisdiction is without merit. We do not understand petitioners to question that FIRREA properly granted the district courts original jurisdiction over any civil suit (with exceptions not material here) to which the FDIC is or becomes a party. See 12 U.S.C. 1819(b)(2)(A) (Supp. III 1991). This case thus came within the district court's subject matter jurisdiction from the time that the FDIC was substituted as a party. Moreover, there is no question that a live controversy existed between the parties at the time of removal, and that a federal court could grant

---

[4] As noted below, the cases litigated to date in the courts of appeals have not established wholly uniform (or clearly exclusive) post-removal procedures. We see no reason to believe, however, that the general approach suggested by the court below is unworkable, or that the lower courts will not be able to develop adequate solutions for any problems that arise in particular cases. In any event, because this case was decided on appeal from a remand order, its facts present no actual post-removal question. The court therefore correctly characterized the dissent's concerns as mere "premonitions" that would unnecessarily complicate the consideration and decision of this case. Pet. App. 17a.

effective relief to the prevailing party. Cf. *Church of Scientology* v. *United States*, No. 91-946 (Nov. 16, 1992), slip op. 5-6 (appellate court has jurisdiction where it can order effective relief from district court order, regardless of whether enforcement of order has divested district court itself of jurisdiction).

Under the decision below, to be sure, on removal of this case from the state appellate court it is possible that the district court will initially do no more than adopt the state trial court's decision, prepare the record and forward it to the federal appellate court. See Pet. App. 15a-16a; *Walker*, *supra*. As the court of appeals pointed out, however, Pet. App. 16a, district courts are often required to take equally "mechanical" actions when cases are remanded with instructions to enter a particular judgment, grant or deny an injunction, or take some other action consistent with the decision of the court of appeals. In all such cases the district court's jurisdiction is unquestioned, although its power in exercising that jurisdiction is severely constrained.

Petitioners appear to concede, moreover, Pet. 16-17, that under Section 1819(b)(2) a district court would have jurisdiction to consider and grant a motion for relief from a state court's judgment so long as that motion was proper and timely under the Federal Rules of Civil Procedure—presumably regardless of the availability of such relief under state procedural rules.[5] It is difficult to understand, however, how a

---

[5] It is not clear that relief from the state judgment under Rule 60(b) would have been improper in this case. None of the opinions in the court of appeals addressed this issue, although the dissent apparently assumed that such relief was unavail-

district court with the power to reopen or modify a state court judgment, subject only to federal procedural constraints, could lack the power to adopt that judgment for the purpose of positioning it appropriately for federal appellate review.

Petitioners suggest no conflict between the decision below and any decision of this Court or of another court of appeals. Indeed, the decision is consistent with those of other courts of appeals that have considered similar issues. See, *e.g.*, *In re Savers Fed. Savings & Loan Ass'n*, 872 F.2d 963 (11th Cir. 1989) (interpreting similar FSLIC statute to allow post-judgment removals); *In re Resolution Trust Corp.*, 888 F.2d 57 (8th Cir. 1989) (interpreting similar RTC statute to allow removal of case on appeal in state court); *Jackson* v. *American Savings Mortgage Corp.*, 924 F.2d 195 (11th Cir. 1991) (same); *Ward* v. *RTC*, 972 F.2d 196 (8th Cir. 1992) (same).[6] There is accordingly no reason for this Court to grant review.

---

able. Petitioners' assertion, Pet. 17 n.8, that all motions under Rule 60(b) are subject to a one-year time limitation is simply inaccurate.

[6] The decisions in the courts of appeals do not reflect complete uniformity with respect to procedure after removal. Compare the decision below (district court may enter state court's decision as its own, predicating federal appeal) with *Jackson* v. *American Savings Mortgage Corp.*, 924 F.2d at 198-199 & nn.9-11 (party seeking appeal should file motion to alter or amend judgment in district court within ten days after removal, see Fed. R. Civ. P. 59(e), with federal appeal lying from grant or denial of that motion) or *Ward* v. *RTC*, *supra* (reviewing denial of motion filed after removal under Fed. R. Civ. P. 60(b)). Differences on post-removal procedure are subsidiary, however, to the central issue of whether post-judgment

2. Petitioners' contention that the court of appeals has created a "wholly independent procedural track" for removals under 12 U.S.C. 1819 (Supp. III 1991), Pet. 12, misapprehends the court's decision. As the court specifically pointed out, Pet. App. 17a-18a, the power to remove a case on appeal in state court does not wholly displace the general removal statutes; it is merely one of several specific provisions relating to the FDIC that supplement and partially supersede the general statutes in the specific circumstances in which they apply. In addition to the right to remove cases on appeal, for example, Congress has provided that the FDIC may remove a case without bond or security; remove a case in which it is (or is substituted as) a plaintiff; remove within 90 (rather than 30) days of commencement of the action, or within 90 days of substitution of the FDIC as a party; and appeal an ordinarily non-appealable order of remand. 12 U.S.C. 1819(b)(2) (Supp. III 1991); see Pet. App. 13a-15a. Indeed, as the court of appeals found, the various procedural advantages conferred on the FDIC with respect to removal clearly indicate "the importance Congress placed on getting cases falling under the scope of FIRREA into federal courts," and are completely consistent with the court's holding that Section 1819 allows removal at any stage before a state judgment becomes final and non-appealable. Pet. App. 15a. Together, these special removal rules "allow the FDIC to step into the shoes of a troubled

---

removal is permissible at all. On that issue the lower courts are in agreement. As noted above, this case was decided on appeal from an order of remand, and its facts therefore present no actual post-removal procedural question.

financial institution at any stage of [the] proceedings without being penalized for the timing of that substitution[,] and to effectively and aggressively protect the institution's interests and assets." *Ibid.*

3. Petitioners quarrel with the court of appeals' reading of the statutory language. Pet. 14-17. As this Court has frequently made clear, however, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 112 S. Ct. 1146, 1149 (1992). The decision below gives full scope to the plain language of Section 1819(b)(2)(B), which provides for removal of "*any* action, suit, or proceeding from *a State court* to the appropriate United States district court" (emphasis added). Petitioners, on the other hand, rely on an inconclusive statement in a legislative committee report to argue that "any action, suit, or proceeding" refers only to the types of cases that the FDIC can remove, not to the procedural status of the litigation. Pet. 15-16. Yet the only limitation on the meaning of "any" found in the statutory language is an express exception, inapplicable here, for certain cases in which, among other things, the FDIC was appointed as receiver solely by state authorities. Moreover, as the court of appeals remarked, Pet. App. 8a-9a, the lack of any qualification of the phrase "a State court" implies that it should be read broadly to include any such court. Compare 12 U.S.C. 632 (providing for removal of certain international banking law suits involving federally chartered corporations "at any time before the trial thereof"); see also *In re Savers Fed. Savings*, 872 F.2d at 966.

As noted above, petitioners appear to concede the propriety of removal after judgment under some circumstances, but suggest that removal is prohibited once a state notice of appeal has been filed. Pet. 11. There is simply nothing in the statutory language (or legislative history) to support such a result. Congress's primary concern in enacting the jurisdictional provisions of FIRREA was to ensure that the FDIC would have access to a federal forum in which to litigate cases it inherited upon appointment as a receiver. The key element in this access is the entry of the FDIC into the litigation as a party, placing important federal interests at stake. Congress understood that "[t]he appointment of a conservator or receiver can often change the character of litigation." H.R. Rep. No. 54, 101st Cong., 1st Sess. Pt. I, at 331 (1989). The fact that a case is actually on appeal in state court, rather than pending appeal or still pending judgment in a trial court, does not change the fact that once the FDIC becomes a party, a federal statute vests jurisdiction in the appropriate federal district court. The court of appeals' decision properly interprets the statutory language, and accords fully with the legislative goal of affording federal interests, represented here by the FDIC, the protection of a federal forum. See generally Pet. App. 13a-15a. There is no reason for further review.

4. Finally, petitioners allege broadly, Pet. 22-25, that the decision below violates constitutional principles of full faith and credit, comity, and federalism, as well as the Tenth and Seventh Amendments.[7] Spe-

[7] Petitioners did not raise any of these arguments in their briefs in the court of appeals.

cifically, petitioners object to the reexamination or alteration of the state trial court's judgment by any lower federal court.[8] Petitioners' arguments would, however, impugn any provision for removal from a state trial court after judgment, and therefore have no merit.

As the court of appeals recognized, Pet. App. 10a, it has long been settled that Congress may provide for removal to federal court of cases otherwise within their constitutional jurisdiction, and may authorize such removal "either before or after judgment." *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 349 (1816); see generally C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3721 (1985). Congress having explicitly provided that any case in which the FDIC is a party shall be treated as arising under the laws of the United States, 12 U.S.C. 1819 (b)(2)(A) (Supp. III 1991), and therefore within the original jurisdiction of the federal district courts, 28 U.S.C. 1331,[9] it is within Congress's constitutional power to allow removal of such cases at any stage

---

[8] Petitioners also argue that the court of appeals' decision violates principles of finality and res judicata. Such arguments ignore the fact that the state trial court judgment was on appeal and subject to modification or reversal. See Pet. App. 5a-6a; cf. *Ward*, 972 F.2d at 198 (res judicata inapplicable where case removed while on appeal and subsequent state appellate decision void).

[9] Petitioners do not question the propriety of this provision. See Pet. App. 10a-13a (reviewing history of federal question jurisdiction and concluding that Section 1819's grant of jurisdiction is constitutionally permissible); *Pacific R.R. Removal Cases*, 115 U.S. 1 (1885); *American Nat'l Red Cross* v. *S.G.*, 112 S. Ct. 2465, 2475-2476 (1992).

before the ultimate conclusion of the state proceedings. Petitioners' prudential arguments cannot prevail "where, as here, Congress itself has weighed interests of federalism and comity and given the [FDIC] the power to remove cases to the federal courts." *In re Savers Fed. Savings*, 872 F.2d at 966.

Petitioners argue further, Pet. 24-25, that the findings of the state court jury may not be reexamined by a federal court, "otherwise * * * than according to the rules of the common law." U.S. Const. Amend. VII. In 1870, this Court invalidated under the Seventh Amendment a statute providing for post-judgment removal *and automatic retrial* of civil cases tried before a state court jury. *The Justices* v. *Murray*, 76 U.S. (9 Wall.) 274, 276-282. Nothing in Section 1819 or in the decision below suggests, however, that after removal the facts found by the jury in this or any other case would be treated with any less respect than would have been accorded to similar findings had the case originally been tried in federal court. See Fed. R. Civ. P. 59, 60; *Parsons* v. *Bedford*, 28 U.S. (3 Pet.) 433, 448 (1830) (common law recognized grant of new trial by trial or appellate court). There is accordingly no valid Seventh Amendment objection to post-judgment removal under Section 1819.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ALFRED J.T. BYRNE
General Counsel

JACK D. SMITH
Deputy General Counsel

ANN S. DUROSS
Assistant General Counsel

RICHARD J. OSTERMAN, JR.
Senior Counsel

DANIEL H. KURTENBACH
Counsel
Federal Deposit Insurance Corporation

DECEMBER 1992